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No. 07-1006

IN THE

Supreme Court of the United States

NANOPIERCE TECHNOLOGIES, INC. (N/K/A VYTA CORP.), KATHY-KNIGHT MCCONNELL, HELEN KOLADA, MAUREEN O'SULLIVAN, JANE SEITZ, STEPHEN SEITZ, AND JAMES STOCK,

Petitioners,

v.

DEPOSITORY TRUST AND CLEARING CORPORATION, DEPOSITORY TRUST COMPANY, AND NATIONAL SECURITIES CLEARING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Nevada Supreme Court erred in holding that petitioners' challenge to respondents' Stock Borrow Program, a component of the uniform SEC-approved system for clearing and settling the nation's securities transactions – a challenge cast as state law misrepresentation claims but actually rooted in alleged inherent defects in the program itself – would stand as an obstacle to the SEC-approved program and is therefore subject to conflicts preemption.

CORPORATE DISCLOSURE STATEMENT

Respondent, The Depository Trust & Clearing Corporation has no parent corporation and no publicly held company owns 10% or more of its stock. It is the sole owner of all other respondents.

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INTRODUCTION

The decision of the Supreme Court of Nevada, upholding the dismissal of the amended complaint on grounds of conflicts preemption, is one of several decisions (none of which are cited in the Petition) consistently applying the preemption doctrine to dismiss purported state law attacks on the Stock Borrow Program ("SBP"), which respondents operate under rules approved by the U.S. Securities and Exchange Commission ("SEC").[1]

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[1] Respondents are The Depository Trust & Clearing Corporation and its subsidiaries (collectively, "DTCC"). Co-counsel for petitioners have unsuccessfully brought several actions asserting state law claims against respondents substantively identical to those presented here. Each has been dismissed on grounds of federal preemption. *See Pet Quarters, Inc. v. DTCC*, 4:04-cv-1528, 2008 U.S. Dist. LEXIS 15316 (E.D.Ark. Feb. 25, 2008) (dismissing challenge to SBP on grounds of federal preemption); *Capece v. DTCC*, Case No. 05-80498, 2005 U.S. Dist. LEXIS 42039 (S.D. Fla. Oct. 11, 2005) (same); *Whistler Investments, Inc. v. DTCC*, Case No. CV-S-05-0634-RJC (PAL) (D. Nev. May 24, 2006) (same), appeal in Docket No. 06-16088 argued March 10, 2008 (9th Cir.).

The SBP was also challenged in *Sporn v. Elgindy*, 2:04-cv-06417-R-PJW (C.D. Cal. July 26, 2005). Respondents moved to dismiss, *inter alia*, on grounds of federal preemption. By order filed July 25, 2005, the third amended complaint was summarily dismissed. *See also X-Clearing Corporation v. Depository Trust Corp.*, 03 CV 1169 (Dist. Ct., Denver, Col. Oct. 3, 2003) (dismissing as preempted claims by a company alleged to be the victim of naked short selling that it should be permitted to "exit" its publicly issued shares from DTCC's depository facility).

(Cont'd)

The SBP is a component of the uniform system for clearing and settling the nation's securities transactions, established pursuant to Section 17A of the 1975 Amendments to the Securities Exchange Act of 1934 ("Section 17A"), 15 U.S.C. § 78q-1. As explained by the SEC to the court below in its *amicus curiae* submission, the premise of petitioners' claims is wholly inconsistent with the SEC's approval of the SBP pursuant to Section 17A, and allowance of petitioners' claims would frustrate Congress's express goals in establishing the uniform "National Clearance and Settlement System" under SEC supervision. 15 U.S.C. § 78q-1(a)(2)(A)(i).[2]

The holding that petitioners' claims are preempted poses no conflict with any of the court decisions identified by petitioners, including *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

(Cont'd)

Other cases including challenges to the SBP were withdrawn or abandoned. *See Capece, Jr. v. Depository Trust*, Case No. 04-8043 (S.D. Fla. April 28, 2004) (withdrawn); *Nutek Inc. v. Ameritrade, Inc., et al.*, 2:03-cv-00321-PMP-RJJ (D. Nev. Aug. 3, 2004) (withdrawn against DTCC defendants after filing of motion to dismiss); *Williamson v. Goldman, Sachs & Co. et al.*, 3:03-cv-00057-HDM-RAM (D. Nev.) (filed but never served upon named DTCC defendants); *Genemax Corporation v. Knight Securities, LP., et al.*, 3:02-cv-00509-ECR-RAM (D. Nev.) (same).

[2] The SEC's *amicus* brief, urging affirmance on grounds of conflicts preemption, was filed in the Nevada Supreme Court by Order dated March 30, 2006. That brief is available on the SEC's website at www.sec.gov/litigation/briefs/nanopiercesec brief.pdf. The SEC filed a similar brief with the Ninth Circuit in the pending appeal in *Whistler Investments*.

Although styled as a state law misrepresentation case to try to avoid the preemptive effect of the SEC's approval of the challenged program, any reading of the complaint makes plain that it is a facial attack on the uniform, national system for clearance and settlement of securities transactions, and as such preempted.[3] Petitioners (collectively, "Nanopierce"), claim that the SBP, approved by the SEC in 1981, has certain inherent defects – the creation of "phantom shares" that harm the marketplace – and that respondents failed to disclose the SBP's "real effect" to the investing public. (Pet. 15.) As the Nevada Supreme Court held (Pet. App. 17A-21A), the complained-of "misrepresentations" are simply Nanopierce's characterizations of the SBP, which are wholly contrary to the SEC's own characterizations and assessment in approving the program pursuant to its Congressional mandate.

Nanopierce did not allege that any misrepresentations were made regarding the company. Nor did Nanopierce allege that the SBP operates differently with respect to Nanopierce stock than it does with respect to the stock of any of the thousands of other companies for which transactions are cleared and settled by DTCC. The alleged "misrepresentations" at issue did not arise in connection with any Nanopierce-specific conduct. Rather, petitioners challenge the uniform and automated operations of the SBP under SEC-approved rules and oversight, and in particular the discrepancy

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[3] The complaint contained not only claims concerning alleged misrepresentations and omissions but also what the Supreme Court of Nevada termed "non-misrepresentation claims," all of which were found preempted. Petitioners have abandoned the latter. (*See* Pet. 19 n.17.)

between the descriptions of the program contained in those approved rules and the pejorative characterizations contradicting the rules that petitioners insist state law requires respondents to disseminate.

Underlying this case and the several others exactly like it is Nanopierce's challenge to a trading strategy known as "naked short selling." (Pet. 14.) Naked short selling is illegal and subject to regulation by the SEC. *See Amendments to Regulation SHO*, 72 Fed. Reg. 45544 (Aug. 14, 2007) (adopting final rule amending Regulation SHO, 17 C.F.R. Part 242.200, 203; *"Naked" Short Selling Anti-Fraud Rule*, SEC Rel. 34-57511 (March 17, 2008) (proposed new Rule 10b-21, addressing naked short-selling, published for notice and comment). Nonetheless, through a series of facial attacks on the SEC-approved SBP (presented as garden variety misrepresentation claims), Nanopierce and plaintiffs in the companion cases have sought to impose the financial responsibility for damages allegedly caused by such naked short selling in the marketplace on the post-trade national clearance and settlement system.[4]

None of the inapposite cases cited by petitioners in arguing that state-law claims have "regularly been adjudicated" against clearance and settlement activities (Pet. 6 and n.2) addressed a frontal challenge to

[4] The parties responsible for alleged fraudulent transactions in Nanopierce stock have not been sued in this action, but were sued in another action, *Nanopierce Technologies, Inc. v. Harvest Court LLC, et al.*, No. 02-CV-0767 (S.D.N.Y.). The district court in that case recently entered summary judgment dismissing each of Nanopierce's claims. 2008 U.S. Dist. LEXIS 6225 (S.D.N.Y. Jan. 28, 2008).

federally-approved activities, as is the case here, or indeed addressed any preemption defenses at all. Rather, the cases cited by petitioners all dealt with ordinary-course business disputes regarding specific transactions between DTCC and the respective plaintiffs – not claims (such as here) effectively attacking a component of the federally-approved clearance and settlement system.[5] *Compare* cases cited nn. 1 and 5 *supra; cf. American Agricultural Movement, Inc, v. Board of Trade of Chicago*, 977 F.2d 1147 (7th Cir. 1992); *Myers v. Merrill Lynch & Co.*, No. C-98-3532, 1999 WL 696082, at *8-9 (N.D. Cal. Aug. 23, 1999), *aff'd*, 249 F.3d 1087 (9th Cir. 2001).

Nanopierce has cited no case, and DTCC is aware of none, that has ever applied state law to impose damages or injunctive relief against an SEC-approved component of the National Clearance and Settlement System. To the contrary, there is an unbroken line of cases in which

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[5] The exception is *Goldstein v. Depository Trust Corporation*, January Term, 1989, No. 3300 (Phil. Ct. Common Pleas), in which petitioners cite a long-superseded interim ruling (717 A.2d 1063 (Pa. Super. Ct 1998)) said to reflect an adjudication of state law claims in connection with the clearance of securities. (Pet. 6 n.2.) In fact, apparently unknown to petitioners, *Goldstein* was subsequently dismissed on preemption grounds because, as here, the challenged activity was taken pursuant to The Depository Trust Company's SEC-approved rules. (Unreported decision, December 28, 2001, copy provided to petitioners herewith.) The remaining cases relied upon by petitioners in arguing that relevant "state law claims have regularly been adjudicated" (Pet. 6, n.2) were decided long before Congress enacted the National Clearance and Settlement System in 1975 and long before respondents had even come into existence, and are completely inapposite.

the courts have recognized the primacy of the SEC in regulating the uniform post-trade securities handling process and invoked the preemption doctrine to dismiss state law claims. *See* n.1 *supra*. Those cases make plain that Nanopierce's effort to create the spectre of a state judiciary in disarray and in need of this Court's intervention is baseless. Nothing about this case merits this Court's attention.

STATEMENT OF THE CASE

1. In the late 1960s, Wall Street experienced a "paperwork crisis," as the volume of securities transactions (a tiny percentage of today's volumes) overwhelmed the industry's ability to process transactions. *See* Sen. Rep. No. 94-75, 1975 U.S.C.C.A.N. 179 (Apr. 14, 1975) (hereafter "Sen. Rep.") at 183. Congress recognized that paper indicia of securities ownership was incompatible with the modern securities industry: "A second major purpose of the legislation [Section 17A] is to initiate concrete steps toward the elimination of the negotiable stock certificate as a means of transferring securities." *Id.* at 236-37; *see also* H.R. Conf. Rep. No. 94-229 (May 19, 1975) at 92-93.

Congress's solution to the paperwork crisis and the fractured nature of the post-trade securities handling system (*see* Sen. Rep. at 183-84) was embodied in Section 17A, whose principal goal was "the development of *uniform standards and procedures for clearance and settlement* [of securities transactions] . . . ." 15 U.S.C. § 78q-1(a)(1)(D) (emphasis added); *see also* 15 U.S.C. § 78q-1(a)(1)(A) (Section 17A designed to create a

uniform national system for the prompt and accurate clearance and settlement of securities transactions).[6]

Section 17A vested the SEC with the centralized authority to preside over the National Clearance and Settlement System in order to increase efficiency and reduce risk. 15 U.S.C. § 78q-1(a)(2)(A)(i); *see Self-Regulatory Organizations: The Depository Trust Company: Order Granting Approval of a proposed Rule Change Concerning Requests for Withdrawal of Certificates by Issuers*, SEC Rel. No. 34-47978, 68 Fed. Reg. 35037, at 35041 (June 4, 2003) (hereafter, the "June 4 SEC Order"). The SEC was empowered to regulate, coordinate, and direct the operations of all persons involved in processing securities transactions; it was directed to "regulate[ ] . . . *every facet* of the securities handling process . . . clearing agencies, depositories, corporate issuers, and transfer agents." Sen. Rep. at 233 (emphasis added).

In developing the new National Clearance and Settlement System, Congress was prescient in foreseeing that "advances in data processing" would

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[6] Petitioners correctly note (Pet. 8 n.4) that following the adoption of Section 17A, the Uniform Commercial Code was revised so that state law of property ownership would recognize that under the new system investors would acquire and transfer "securities entitlements" maintained at "securities intermediaries" rather than paper stock certificates. *See* UCC 8-102(a) (14) & (17), 8-501. The revised UCC also recognized, however, that the SEC-registered clearing agencies (such as respondents) would maintain responsibility for the clearing and settling operations and their rules would be effective even if in conflict with a provision of Article 8. UCC 8-111.

enable the industry to emerge from the ocean of paper in which it was drowning, turning, instead, to electronic systems to evidence ownership and transfer of securities. 15 U.S.C. § 78q-1(a)(1)(C).[7]

2. Pursuant to its delegated authority, the SEC approved the registration of respondents The Depository Trust Company ("DTC") and the National Securities Clearing Corporation ("NSCC") as registered clearing agencies. June 4 SEC Order at 35041; *National Securities Clearing Corp.: Order Granting Registration and Statement of Reasons,* 42 Fed. Reg. 3916 (Jan. 13, 1977).

DTC and NSCC are New York corporations and wholly-owned subsidiaries of respondent The Depository Trust & Clearing Corporation. Each performs separate and critical functions in the federal uniform clearance and settlement system. DTC and NSCC maintain accounts and provide services only for the major financial institutions that constitute their respective participants/members; they do not maintain accounts for issuers or investors, including petitioners here.

DTC is the nation's principal securities depository. It operates an automated, centralized system for book-entry movement of securities positions in the accounts of its participants, the nation's major brokerage houses

[7] The transfer of securities entitlements by electronic means is key to market liquidity. On a daily basis, DTCC's automated systems clear and settle millions of transactions constituting billions of shares of stock. A tiny fraction of today's volumes completely overwhelmed Wall Street during the paperwork crisis.

and banks (who, in turn, serve as securities intermediaries for their own institutional and retail customers). Securities deposited at DTC are registered in the name of DTC's nominee, "Cede & Co.," and immobilized at the depository. This enables DTC to facilitate the automated movements of securities positions without the need to transfer paper indicia of ownership, serving "a critical function in the National Clearance and Settlement System." June 4 SEC Order at 35041 and n.62. Securities on deposit at DTC have a value of over $35 trillion. *See* http://www.dtcc.com/downloads/annuals/2006/2006_report.pdf at p. 30.

NSCC provides centralized clearance, settlement and information services for virtually all broker-to-broker equity, corporate bond and municipal bond and other securities transactions in the United States. As petitioners acknowledge (Pet. 12), in order to facilitate the enormous volume of daily transactions, NSCC's automated "Continuous Net Settlement" system ("CNS") nets down each member-broker's daily position in each security to a single obligation to deliver or receive that security and a corresponding single obligation for payment or receipt of funds. The member-brokers then deliver the net securities or net funds into NSCC's securities settlement system on the settlement date and the system, acting as the central counter-party, allocates the shares and funds to member brokers with a right to receive. *Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, SEC Rel. No. 34-50758, 69 Fed. Reg. 70852 at 70856 and n.55 (Dec. 7, 2004). Changes in beneficial ownership of securities resulting from transactions cleared and settled at NSCC

are implemented by automated book-entry movements of positions in accounts at DTC. June 4 SEC Order at 35014.

The SEC's registration of DTC and NSCC and approval of their rules was necessarily premised on its finding that those agencies, and their rules, met specified statutory objectives implementing the essential objectives of Section 17A, including removing "impediments to and perfect[ing] the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions." 15 U.S.C. § 78q-1(b); *see also* 15 U.S.C. § 78q-1(b)(3)(A) (requiring the SEC to find that clearing agency rules facilitate the prompt and accurate clearance and settlement of securities transactions, safeguard securities).

Clearing agencies such as DTC and NSCC must operate pursuant to their SEC-approved rules, and they cannot issue or alter their rules absent approval by the SEC pursuant to the statutory standards. *See* 17 C.F.R. 240.17a-22; *Depository Trust Co., et al.: Order*, SEC Rel. No. 20221, 48 Fed. Reg. 45167-02, 45171 (Oct. 3, 1983) (approving NSCC and DTC rules); and 15 U.S.C. § 78q-1(a)(2).

3. The SBP was approved by the SEC in 1981 and has been in operation ever since. *See National Securities Clearing Corporation: Proposed Rule Change*, SEC Rel. No. 34-17422, 46 Fed. Reg. 3104 (Jan. 13, 1981) (notice of filing of proposed rule change making SBP permanent), *see also Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, SEC Rel. No. 34-50758, 69 Fed. Reg. 70852, n.57 (Dec. 7, 2004)

("[T]he Stock Borrow Program was approved by the [Securities and Exchange] Commission.").

The SBP is a uniform, automated program used in certain instances where insufficient shares of a particular security have been delivered to NSCC on the settlement date. In order to fulfill its delivery obligations to buying brokers, the CNS system, utilizing the SBP, will automatically borrow securities from members who have (1) voluntarily made such shares available for loan to the clearing corporation and (2) actually have such securities on deposit in their DTC accounts. NSCC then uses these securities, along with the securities delivered to CNS by selling brokers (without making any distinction) to make deliveries to members with the right to receive delivery, thus satisfying the buyer's side of the transaction.

The SBP does not affect the seller's side; a member who has failed to deliver remains obligated to do so. Moreover, sellers who fail to deliver do not and cannot know whether the SBP is being utilized on the settlement date when they failed to deliver. As to the member who has loaned shares through the SBP, those shares are deducted from the member's DTC account (and thus cannot be sold, loaned, pledged, etc. by the lending member until returned to its DTC account).[8]

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[8] Nanopierce's contentions that NSCC has "permit[ted] failures to deliver to remain uncured" and has "facilitated the practice of naked short selling" by market participants (Pet. 14) entirely misapprehends NSCC's role in the National Clearance and Settlement System. NSCC has neither the power nor the obligation to force sellers to deliver; regulatory authority rests

(Cont'd)

4. For all the repeated references to "misrepresentations and omissions," neither Nanopierce's complaint nor its Petition for Certiorari identify any misrepresentations or omissions specific to Nanopierce. The essential claim is that the SBP has undisclosed inherent "defects" (*see* Compl. ¶¶ 89-100) that are alleged to have facilitated the abusive practice of naked short selling and depressed the value of Nanopierce stock (Pet. 14). Reflecting the facial nature of this attack, Nanopierce characterizes the SBP as a "scheme," the "real effect" of which is "to create phantom shares that dilute the value of validly issued shares" (Pet. 15), which respondents fail to disclose to the public.[9]

(Cont'd)
with the SEC and other bodies exercising enforcement powers. *See* www.sec.gov/litigation/briefs/nanopiercesec-brief.pdf at 12-13. To the extent that the gravamen of Nanopierce's claims (as it candidly concedes) is that it and its stockholders have been damaged by "naked short selling" of Nanopierce stock by unscrupulous market participants, its remedies therefore lie either with suits against alleged market manipulators (*see supra* p. 4 and n. 4) or with the SEC and other enforcement authorities. As Nanopierce's own quotation from SEC Chairman Christopher Cox (Pet. 16) suggests, the SEC is exercising its authority to monitor and address the naked short selling issue. *See, e.g.*, Regulation SHO, 17 C.F.R. Part 242.200, and amendments thereto (*Amendments to Regulation SHO*, SEC Rel. 34-56212, 72 Fed. Reg. 45544 (Aug. 14, 2007)).

[9] Nanopierce mischaracterizes its allegations as setting forth a "misuse" of the SBP beyond the purpose for which it is approved (Pet. 14) and as seeking disclosure of DTCC's "actual business practices" (Pet. 19). The complaint, however, is unambiguously premised not on any misuse of the SBP but on the SBP's essential nature (its "real effect") and operation under SEC-approved rules. *See* Pet. App. 31a (no allegation that respondents violate SBP rules).

The affirmative misrepresentation claims are similarly rooted in the SEC-approved rules themselves; petitioners maintain that state law requires DTCC to make disclosures that contradict the rules, despite their federal approval. For example, petitioners allege that the SBP "misrepresents" itself as a borrowing program when it is actually a sale of securities. Compl. ¶ 102 (First Claim for Relief). But the SEC-approved rules explicitly characterize the SBP as a borrowing program. *National Securities Clearing Corporation: Proposed Rule Change*, SEC Rel. No. 34-17422, 46 Fed. Reg. 3104; *see* Pet. App. 19a. Similarly, Nanopierce alleges that the SBP results in the inefficient clearing and settling of trades, and therefore DTCC's public disclosures otherwise (to Congress and the public) are actionable. Compl. ¶ 114 (Second Claim for Relief). But, in approving the SBP rules and continuing to supervise the program, the SEC has already determined that the program meets the Congressional mandate of "remov[ing] impediments to and perfect[ing] the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions." 15 U.S.C. § 78q-1(b)(3)(F); *see also* Pet. App. 20a; www.sec.gov/litigation/briefs/nanopiercesecbrief.pdf at 17-18.[10]

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[10] The remainder of Nanopierce's purported misrepresentation claims (none of which the Petition addresses individually) similarly attack the fundamental nature of the SBP and its rules and are in actuality facial attacks on the program. *See, e.g.*, Compl. ¶¶ 127-130 (Third Claim) (accounting procedures explicitly set forth in the SBP rules (*see* Pet. App. 21a) alleged to "misrepresent" the number of shares in members' accounts); Compl. ¶¶ 139-142 (Fourth Claim) (defendants misrepresent that buy-ins are executed in the marketplace when, allegedly, they

(Cont'd)

The complaint thus challenges the SBP on its face. It seeks to utilize purported state law standards to regulate and ultimately obstruct a federally authorized activity by imposing damage awards on respondents, to the tune of hundreds of millions of dollars, for (1) failing to disclose alleged inherent defects that the SEC did not discern either in approving the program or in its ongoing oversight and (2) making "misrepresentations" that actually constitute the substance of the approved rules.

5. On a motion to dismiss based on federal preemption, lack of personal jurisdiction and failure to state a cause of action, the motion court dismissed Nanopierce's suit under the preemption doctrine, without reaching the other grounds asserted. Pet. App. 28a at 31a-32a. The Nevada Supreme Court affirmed, holding that Nanopierce's claims

> conflict with Congress's regulatory scheme, since imposing the requirements implicated by appellants' state law claims, which they primarily base on allegations that respondents conceal flaws in a Commission-approved national system for clearing and settling securities transaction, frustrates Congress's

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(Cont'd)
are executed through the SBP, even though the rules (cited in Compl. ¶ 91) explicitly state that buy-ins are executed in the marketplace). *See* Pet App. 17a-21a (finding by the court below that each SBP "misrepresentation" claim asserted here actually constitutes challenge to the program as approved and is preempted); *Pet Quarters*, 2008 U.S. Dist. LEXIS 15316, at * 15-18 (same).

> objectives with respect to the clearing and settling regulatory scheme and renders adherence to both that regulatory scheme and state law impossible.

Pet. App. 24a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE NEVADA SUPREME COURT'S DECISION AND THE INAPPOSITE AUTHORITIES CITED BY PETITIONERS

There is no conflict between the decision below and any decision of any court of appeal or state high court, notwithstanding strained contentions to the contrary. The Nevada Supreme Court's holding is in line with all the other decisions addressing conflicts preemption in comparable cases, and presents no issue warranting this Court's review.

Nanopierce seeks to have a state court jury find that the SBP has "defects" that the SEC has determined do not exist, and award enormous damages against respondents for failing to make disclosures of these inherent "defects" and other matters that conflict with the SEC-approved SBP rules. This application of state law, as erroneously construed by Nanopierce, stands as an obstacle to Congress' determination that the SEC would exercise plenary authority over "every facet" of a uniform system for clearing and settling the nation's securities transactions – here manifested by the approval of the SBP – requiring preemption of those state claims

under longstanding authority. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (where federal agency permitted, but did not mandate, banks to enforce due-on-sale clauses in their mortgages, state law prohibiting such clauses was barred under conflicts preemption); *see also Credit Suisse First Boston Corp v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (SRO rules approved by the SEC preempt conflicting state law), *citing Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973).[11]

1. The Delaware Supreme Court's decision in *O'Malley v. Boris*, 742 A.2d 845 (Del. 1999), the centerpiece of Nanopierce's argument (Pet. 20-22), presents no conflict with the decision below. *O'Malley* was a suit by customers against their broker for its fraudulent misrepresentations concerning their own accounts – wholly unlike the present suit against self-regulatory organizations (that have no interactions with the petitioners) responsible for operating the national clearance and settlement system under SEC-approved

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[11] *Geier* found that the plaintiffs' state law claims were barred by conflicts preemption notwithstanding a "savings clause," in the federal statute, as courts have done regularly. *Id.*, 529 U.S. at 870 (citing cases); *see also, e.g., Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (finding conflicts preemption of state law claims notwithstanding a savings clause in the Clean Water Act); *American Agricultural Movement, Inc, v. Board of Trade of Chicago*, 977 F.2d 1147, 1155 (7th Cir. 1992) (finding conflicts preemption notwithstanding savings clause in Commodity Exchange Act). Petitioners' discussion of various savings clauses (Pet. 9-10) has no bearing on the conflicts preemption analysis.

rules. In *O'Malley*, the brokerage firm utilized a "negative response" letter pursuant to an NASD rule to notify its customers of an intent to transfer their accounts, without disclosing that the brokerage firm would benefit financially by doing so. The defense that the claims were preempted was unavailing because disclosing the broker's financial interest in transferring the accounts "would not interfere with the purpose of effectiveness of the NASD rule. . . ." 742 A.2d at 849. Here, by stark contrast, the requested disclosures flatly contradict the fact of the SEC's approval as well as the actual language of the SBP. Nor is *O'Malley* otherwise analogous to petitioners' claims here. The analogous claim would be a damages action under state law against brokers who failed to disclose that the NASD-approved "negative response" program inherently operated as a fraud against their customers. Nothing in *O'Malley* remotely indicates that the Delaware Supreme Court would have permitted such claim. *Compare O'Malley*, 742 A.2d at 849.

That *O'Malley* poses no conflict whatever is plain from the Delaware Supreme Court's express distinction of its decision from *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. 1996) *cert. denied*, 520 U.S. 1118 (1997), which the Petition acknowledges is consistent with the Nevada Supreme Court's decision here. (Pet. 22.) The New York Court of Appeals in *Guice* held that state law claims based on allegedly inadequate disclosures concerning order flow payments were preempted in light of the SEC's specific requirements regarding what had to be disclosed. *Guice*, 674 N.E.2d at 288. By contrast, the NASD rule at issue in *O'Malley* did not purport to limit the disclosures which may be included in a "negative action" letter. *O'Malley*, 742 A.2d at 849.

2. Nanopierce's attempt to create a decisional conflict with cases involving the Federal Alcohol Administration Act and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") (Pet. 23-30) is bootless. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) and *Bronco Wine Co. v. Jolly*, 95 P.3d 422 (Cal. 2004), *cert. denied*, 546 U.S. 1150 (2006), were express preemption cases in which the courts construed Congress's intent in adopting the precise preemption language at issue. The holdings of non-preemption were premised in significant part on the facts that the federal statutes at issue contemplated supplemental state regulation. In fact, FIFRA was held to be a "decentralized" statutory scheme which permitted states to ban pesticides that the EPA had approved. *Bates*, 544 U.S. at 451; *see also Bronco Wine*, 95 P.3d at 447-450. Here, by stark contrast, Congress mandated "*uniform standards and procedures for clearance and settlement*" under SEC-approved rules. 15 U.S.C. 78q-1(a)(1)(D) (emphasis added).

3. The Petition also ignores both the companion SBP cases (*supra*, n.1) and *American Agricultural Movement, Inc, v. Board of Trade of Chicago, supra* (hereafter, "*AAM*"), where the Seventh Circuit held preempted state law claims asserted against the Chicago Board of Trade – notwithstanding a savings clause in the pertinent federal regulation – because permitting the plaintiff to bring its state law claims against the Board of Trade would frustrate Congress' intent to bring the markets under a uniform set of regulations.

In *AAM*, plaintiffs had asserted various Illinois common law claims against a program operated by the

Chicago Board of Trade, pursuant to the authority of the federal Commodities Exchange Act. In holding those claims to be preempted, the Seventh Circuit held that preemption was not mandated where resolution of a dispute would affect only the relationship between broker and investor – both marketplace participants involved in the purchase and sale of securities – but would apply where the proposed application of state law would directly affect the operations of the Board of Trade itself. *Id.* 977 F.2d at 1156-57. As the court explained:

> [A] law of general application, when applied in a manner that would govern or supervise the operation of or trading on a contract market, raises the same unwelcome specter of non-uniformity as does a law that, by its terms, purports to govern or supervise the same. The crucial inquiry, we reiterate, is the context in which a law is applied . . . . Laws of general application of course operate in a variety of arenas, and are preempted only when [Appellants] attempt to use them in a manner that would, in effect, regulate the futures markets.

Id. at 1157. Here, as in *AAM*, Congress has set national uniformity as a central goal in operating the post-trade securities handling process, and claims asserted under state laws of general application are preempted to the extent that litigants seek to apply them so as to interfere with the uniform federal policy.

Nor may Nanopierce escape preemption by arguing (as it did in the Nevada courts) that its Complaint seeks

only damages, and not injunctive relief dismantling the SBP. It is beyond dispute that "a liability award 'can be, indeed is designed to be, a potent, method of governing conduct and controlling policy.'" *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008), *citing Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). Since it is the SEC, and not the state courts, that is vested by Congress with determining whether DTCC's programs are accurate and efficient and otherwise meet the standards required by Section 17A, the judgment below is correct and warrants no further review. Once the SEC has so determined with regard to DTCC's necessarily uniform system, it would undermine Congress's expressed goals to permit the courts of the 50 states to revisit and overrule that determination, whether by injunction or by the imposition of damages awards.

II. THE DECISION RAISES NO IMPORTANT ISSUE WARRANTING THIS COURT'S REVIEW

Contrary to the Petition's claims, the decision below has no implications whatever concerning the interplay of federal and state policies of full and fair disclosure to investors and the remedies available to investors. It concerns not misrepresentations or omissions made by brokers to customers, or by anyone in connection with the purchase or sale of securities in the marketplace, but whether the operation of the system mandated by Congress and overseen by the SEC for post-trade clearing and settlement can be subject to purported state law disclosure obligations that contradict, and therefore obstruct, the federally approved system. Petitioners' discussion of state regulation of securities trading (Pet. 4-6) ignores the distinction between regulation of

trading; *i.e.*, disclosures in connection with the purchase and sale of securities, and regulation of the uniform clearance and settlement system. As petitioners concede, respondents' systems only come into play *after* the trading decisions have been made (Pet. 2), and thus petitioners' discussion of state remedies "for investors harmed by misrepresentation" strays far from the mark. *Cf. AAM*, 977 F.2d at 1156-57.

III. THERE IS NO NEED TO HOLD THE PETITION PENDING THIS COURT'S DECISION IN *ALTRIA*, WHICH RAISES WHOLLY SEPARATE ISSUES

Finally, there is no need for this Court to hold the present Petition pending its review of *Altria Group, Inc. v. Good*, 128 S. Ct. 1119 (2008) (*cert. granted* Jan. 16, 2008), an inapposite case involving the preemptive scope of the express federal preemption provision in federal tobacco regulations in the context of false advertising claims. The statute at issue in *Altria*, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b), expressly precludes states from imposing requirements with respect to cigarette advertising "based on smoking or health" and the issue to be decided on *certiorari* is whether the express preemption provision precludes the application of state law unfair trade practices claim alleging a cigarette ad to be deceptive. There is no reason to suppose that in *Altria* this Court will address implied preemption in a context pertinent to this case, and *Altria* contains nothing like the statutory provision here directing the establishment

of a system with national uniformity. *Altria* is unlikely to provide additional guidance applicable to Nanopierce's preempted facial attack, and the Petition should be denied forthwith.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — AMENDED COMPLAINT OF THE SECOND JUDICIAL DISTRICT COURT FOR THE COUNTY OF WASHOE, STATE OF NEVADA DATED MAY 11, 2004

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

CASE NO. CV04-01079

DEPT. NO. 4

NANOPIERCE TECHNOLOGIES, INC., A NEVADA CORPORATION; STEPHEN SEITZ, AN INDIVIDUAL; JANE SEITZ, AN INDIVIDUAL, KATHY KNIGHT-MCCONNELL, AN INDIVIDUAL, JAMES STOCK, AN INDIVIDUAL, MAUREEN O'SULLIVAN, AN INDIVIDUAL, AND HELEN KOLADA, AN INDIVIDUAL

Plaintiffs,

-against-

THE DEPOSITORY TRUST AND CLEARING CORPORATION; THE DEPOSITORY TRUST COMPANY; AND THE NATIONAL SECURITIES CLEARING CORPORATION,

Defendants.

AMENDED COMPLAINT

BUSINESS COURT REQUESTED

REQUEST EXEMPTION FROM ARBITRATION

Appendix

Plaintiff Nanopierce Technologies, Inc. ("Nanopierce"), Plaintiff Stephen Seitz and Plaintiff Jane Seitz (together, "Seitz"), Plaintiff Kathy Knight-McConnell ("Knight-McConnell"), Plaintiff James Stock ("Stock"), Plaintiff Maureen O'Sullivan ("O'Sullivan") and Plaintiff Helen Kolada ("Kolada") (collectively, the "Plaintiffs") for their complaint against Defendant Depository Trust and Clearing Corporation ("DTCC") and its subsidiaries, Defendant Depository Trust Company ("Depository Trust"), and Defendant National Securities Clearing Corporation ("NSCC") (collectively, the "Defendants"), allege and set forth as follows:

I. Summary

1. The Stock Borrow Program (as described below, commencing at paragraph 84) was purportedly created to address SHORT TERM delivery failures by sellers of securities in the stock market. However, the end result of the program has been to create tens of millions of unissued and unregistered shares to be traded in the public market. Further, in some instances, the Stock Borrow Program has resulted in two or more shareholders who purchase shares in separate transactions to own the same shares.

In the securities marketplace, sellers advertise asking prices and buyers advertise offering prices. When the two prices match, a trade occurs. Clearance is the process of verifying and confirming the terms of the trade, such as the number of shares, price, buyer and seller. After a trade clears, it settles on the date prescribed by

regulation, which means that the seller delivers the shares and the buyer delivers payment. Sometimes the seller is unable to deliver the shares at settlement. When shares are not delivered on settlement day (the "Settlement Day"), the seller is said to have "failed to deliver" the shares. This event is referred to in the securities industry as a "fail to deliver".

Prior to 1981, when a fail to deliver occurred, the buyer held back his payment and waited for the seller to deliver the shares. If the buyer got tired of waiting for the seller to deliver the shares, the buyer went into the market and bought the shares from another seller. This process of going back to the market to buy shares to replace the ones which were not delivered is called "buying in" or a "buy-in." If the price of the shares increased between the time that the buyer originally bought the shares and the time the buyer went into the market to replace them, the buyer charged the additional cost to the seller who failed to deliver. Until 1981, there were only two alternatives available to a buyer whose seller failed to deliver: either wait for the shares to be delivered or go back into the market and buy in the shares.

In an effort to streamline the back office operations of the securities industry, the clearance and settlement functions for virtually all securities trades in the United States were consolidated in the Depository Trust and the NSCC. In 1981, the NSCC created the Stock Borrow Program, purportedly to improve the efficiency of the clearance and settlement function by addressing temporary fail to deliver situations. Under the Stock

Borrow Program, if a seller fails to deliver the shares on time, the NSCC borrows the shares from willing lenders[1] and gives the shares to the buyer in settlement of the trade. The Stock Borrow Program operates through a computer process and now represents the only way that a buyer can cure a fail to deliver by a seller. However, in reality, the Stock Borrow Program does not cure the fail to deliver. The seller still owns the shares. The only change is that the party waiting for the shares is no longer the buyer. Now, it is the NSCC.

Since the NSCC instituted the Stock Borrow Program, there is little incentive for the NSCC to require sellers to cure fail to deliver positions once the loan has been made. The Stock Borrow Program has become a reliable source of income for the Depository Trust, the NSCC and willing lenders who have shares on deposit at the Depository Trust. For the year ended December 31, 2003, the Depository Trust reported revenues from services of $425,416,000 and the NSCC reported revenues from services of $293,133,000.

"The failure of participants to deliver securities to NSCC on settlement date, and the corresponding failure of NSCC to redeliver the securities, results in open positions. . . . At the close of business on December 31, 2003, open positions due to NSCC approximated $3,025,467,000 . . . , and open positions due by NSCC to

1. Willing lenders are brokers and clearing firms who lend their customers' shares to the NSCC. These shares are ultimately held at the Depository Trust through a chain of custody that begins with the customers delivering share certificates to brokers who then deliver the certificates to the Depository Trust.

participants approximated $2,303,717,000 ... for unsettled positions and $721,750,000 ... for securities borrowed through the NSCC's Stock Borrow Program."[2] Because these open positions represent shares borrowed by the NSCC and given to buyers, the NSCC has subjected itself to the risk of significant financial loss if the sellers who failed to deliver are unable to honor their obligation to deliver the shares. In an attempt to reduce this exposure, the Defendants have participated in a scheme to manipulate downward the price of the affected securities, thereby reducing the market value of the open fail to deliver positions with respect to these affected securities. Consequently, fails to deliver, particularly in trades of small capitalization companies such as Plaintiff Nanopierce, are no longer temporary, and frequently remain uncured for months and even years.

The Defendants have permitted sellers to maintain open fail to deliver positions of tens of millions of shares for periods of a year and even longer. This course of conduct by the Defendants has had the effect of creating millions of unregistered illegal free trading shares of the issuer, artificially (1) increasing the supply of an issuer's shares in the marketplace; (2) driving down the price of the stock of the issuer; (3) decreasing the value of the shareholders' holdings in an issuer's stock; and (4) causing multiple owners who purchased shares in separate transactions to own the same shares. Neither the Depository Trust nor the NSCC has authority to

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2. National Securities Clearing Corporation Annual Financial Statements (2003).

issue or create shares. Only the issuer (Plaintiff Nanopierce) has authority to do so.

The abuses of the Stock Borrow Program have been recognized by the National Association of Securities Dealers ("NASD") and measures have been proposed to address them. "Concerns have been raised by members, issuers, investors and other interested parties about potentially abusive short selling activities occurring in the marketplace. In particular, naked short selling, or selling short without borrowing securities to make delivery, *can result in long term failures to deliver, including aggregate failures to deliver that exceed the total float of a security. NASD believes such extended failures to deliver can have a negative effect on the market. Among other things, by not having to deliver securities, naked short sellers can take on larger short positions than would otherwise be permissible, which can facilitate manipulative activity.*"[3]

II. Parties, Jurisdiction, and Venue

2. Plaintiff Nanopierce is a Nevada corporation, with its principal place of business in Denver, Colorado.

3. Plaintiff Seitz are individual shareholders of Nanopierce who reside at Otego, New York.

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3. NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044) (emphasis added).

4. Plaintiff Knight-McConnell is an individual shareholder of Nanopierce who resides at Bronx, New York.

5. Plaintiff Stock is an individual shareholder of Nanopierce who resides at Henderson, Nevada.

6. Plaintiff O'Sullivan is an individual shareholder of Nanopierce who resides at Cleveland, Ohio.

7. Plaintiff Kolada is an individual shareholder of Nanopierce who resides at Cleveland, Ohio.

8. Defendant DTCC is a New York corporation and may be served at its principal place of business at 55 Water Street, New York, New York 10041-0099, Attention: General Counsel.

9. Defendant NSCC is a New York corporation and may be served at its principal place of business at 55 Water Street, New York, New York 10041-0099, Attention: General Counsel.

10. Defendant Depository Trust is a limited purpose trust company formed under the Banking laws of New York and may be served at 55 Water Street, New York, New York 10041-0099, Attention: General Counsel.

11. This Court has subject matter jurisdiction.

12. This Court has personal jurisdiction over the Defendants.

13. Venue is lodged in this Court pursuant to NRS 13.040.

III. General Allegations

A. Plaintiff Nanopierce

14. Shares of Nanopierce are traded on the NASDAQ Over the Counter Bulletin Board under the symbol "NPCT.OB". These shares are eligible to be held in book-entry form at the Depository Trust. According to its Articles of Incorporation and amendments thereto filed with the Nevada Secretary of State, Nanopierce is authorized to issue 200,000,000 shares of common stock.

15. On or about October 20, 2000, Nanopierce entered into a $15,000,000 Purchase Agreement ("Purchase Agreement") with Harvest Court LLC ("Harvest Court") to sell Nanopierce common stock in two installments.

16. At the first closing on October 20, 2000 (the "First Closing"), Nanopierce sold 4,531,161 shares of its common stock to Harvest Court along with a common stock purchase warrant of 453,161 shares. The number of shares Nanopierce sold pursuant to the Purchase Agreement was determined by a formula based on the average closing bid price of Nanopierce stock for ten consecutive trading days before the First Closing.

17. The Purchase Agreement also contained a reset provision which required that Nanopierce issue additional shares to Harvest Court on three separate dates following the First Closing. The number of shares to be issued pursuant to the reset provision was determined by a formula based on the average of the twenty-two lowest closing bid prices of Nanopierce stock during the sixty-five trading days immediately preceding the applicable reset issuance dates.

18. Pursuant to the reset provision in the Purchase Agreement, Nanopierce issued an additional 2,143,975 shares of its common stock to Harvest Court on or about January 31, 2001.

19. After the First Closing, the price of Nanopierce common stock declined continuously from $2.56 on October 20, 2000 to $0.31 on April 23, 2004.

20. Upon information and belief, during the period between the First Closing and April 23, 2004, Nanopierce stock was actively traded and these trades were cleared and settled by the Defendants.

21. Upon information and belief, the price of Nanopierce stock fell because the operation of the Stock Borrow Program by Defendants allowed the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares.

22. The Defendants permitted sellers to maintain significant open fail to deliver positions of millions of

shares of Nanopierce stock for extended periods of time by implementing the Stock Borrow Program to cover these open positions.

23. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

24. The artificially increased supply of Nanopierce shares in the marketplace created by Defendants' borrowing of Nanopierce shares through the Stock Borrow Program caused a dramatic devaluation of Nanopierce stock. As a result, Nanopierce is damaged in an amount to be proven at trial.

B. Plaintiffs Seitz

25. Plaintiffs Seitz are individual shareholders of Nanopierce.

26. During the period between March 2000 and March 2004, Plaintiffs Seitz purchased and sold Nanopierce shares at various pricing ranging from a high of $6.06 to a low of $0.148.

27. Upon information and belief, when Plaintiffs Seitz purchased and sold Nanopierce shares, these transactions were cleared and settled by the Defendants.

Appendix

28. Upon information and belief, the Defendants borrowed Plaintiffs Seitz' Nanopierce shares through the Stock Borrow Program to cover open fail to deliver positins in Nanopierce stock created by sellers who failed to deliver by Settlement Day.

29. Upon information and belief, the price of Nanopierce stock fell because the Defendants' operation of the Stock Borrow Program facilitated or permitted the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares by Settlement Day.

30. The Defendants permitted certain sellers to maintain significant open fail to deliver positions of millions of shares of Nanopierce stock for extended periods of time well beyond Settlement Day by implementing the Stock Borrow Program to cover these open positions.

31. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants have artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

32. The artificially increased supply of Nanopierce shares in the marketplace created by Defendants' borrowing of Nanopierce shares through the Stock Borrow Program has significantly decreased the value of Nanopierce stock and Plaintiffs Seitz' holding in Nanopierce stock. As a result, Plaintiffs Seitz are damaged in an amount to be proven at trial.

C. Plaintiff Knight-McConnell

33. Plaintiff Knight-McConnell is an individual shareholder of Nanopierce.

34. During the period between January 2001 and March 2004, Plaintiff Knight-McConnell purchased and sold Nanopierce shares at various prices ranging from a high of $1.64 to a low of $0.15.

35. Upon information and belief, when Plaintiff Knight-McConnell purchased and sold Nanopierce shares, these transactions were cleared and settled by the Defendants.

36. Upon information and belief, the Defendants borrowed Plaintiff Knight-McConnell's Nanopierce shares through the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock created by sellers who failed to deliver by Settlement Day.

37. Upon information and belief, the price of Nanopierce stock fell because the Defendants' operation of the Stock Borrow Program facilitated or permitted the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares by Settlement Day.

38. The Defendants permitted certain sellers to maintain significant open fail to deliver positions of millions of shares of Nanopierce stock for extended periods of time well beyond Settlement Day by implementing the Stock Borrow Program to cover these open positions.

39. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants have artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

40. The artificially increased supply of Nanopierce shares in the marketplace created by Defendants' borrowing of Nanopierce shares through the Stock Borrow Program has significantly decreased the value of Nanopierce stock and Plaintiff Knight-McConnell's holding in Nanopierce stock. As a result, Plaintiff Knight-McConnell is damaged in an amount to be proven at trial.

D. Plaintiff Stock

41. Plaintiff Stock is an individual shareholder of Nanopierce.

42. During the period between March 2002 and March 2004, Plaintiff Stock purchased and sold Nanopierce shares at various prices ranging from a high of $1.00 to a low of $0.16.

43. Upon information and belief, when Plaintiff Stock purchased and sold Nanopierce shares, these transactions were cleared and settled by the Defendants.

44. Upon information and belief, the Defendants borrowed Plaintiff Stock's Nanopierce shares through

the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock created by sellers who failed to deliver by Settlement Day.

45. Upon information and belief, the price of Nanopierce stock fell because the Defendants' operation of the Stock Borrow Program facilitated or permitted the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares by Settlement Day.

46. The Defendants permitted certain sellers to maintain significant open fail to deliver positions of millions of shares of Nanopierce stock for extended periods of time well beyond Settlement Day by implementing the Stock Borrow Program to cover these open positions.

47. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants have artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

48. The artificially increased supply of Nanopierce shares in the marketplace created by Defendants' borrowing of Nanopierce shares through the Stock Borrow Program has significantly decreased the value of Nanopierce stock and Plaintiff Stock's holding in Nanopierce stock. As a result, Plaintiff Stock is damaged in an amount to be proven at trial.

E. Plaintiff O'Sullivan

49. Plaintiff O'Sullivan is an individual shareholder of Nanopierce.

50. During the period between June 2000 and March 2004, Plaintiff O'Sullivan purchased and sold Nanopierce shares at various prices ranging from a high of $2.0937 to a low of $.34.

51. Upon information and belief, when Plaintiff O'Sullivan purchased and sold Nanopierce shares, these transactions were cleared and settled by the Defendants.

52. Upon information and belief, the Defendants borrowed Plaintiff O'Sullivan's Nanopierce shares through the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock created by sellers who failed to deliver by Settlement Day.

53. Upon information and belief, the price of Nanopierce stock fell because the Defendants' operation of the Stock Borrow Program facilitated or permitted the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares by Settlement Day.

54. The Defendants permitted certain sellers to maintain significant open fail to deliver positions of millions of shares of Nanopierce stock for extended periods of time well beyond Settlement Day by implementing the Stock Borrow Program to cover these open positions.

55. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants have artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

56. The artificially increased supply of Nanopierce shares in the marketplace created by Defendants' borrowing of Nanopierce shares through the Stock Borrow Program has significantly decreased the value of Nanopierce stock and Plaintiff O'Sullivan's holding in Nanopierce stock. As a result, Plaintiff O'Sullivan is damaged in an amount to be proven at trial.

F. Plaintiff Kolada

57. Plaintiff Kolada is an individual shareholder of Nanopierce.

58. During the period between July 2001 and October 2003, Plaintiff Kolada purchased and sold Nanopierce shares at various prices ranging from a high of $1.70 to a low of $.21.

59. Upon information and belief, when Plaintiff Kolada purchased and sold Nanopierce shares, these transactions were cleared and settled by the Defendants.

60. Upon information and belief, the Defendants borrowed Plaintiff Kolada's Nanopierce shares through

the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock created by sellers who failed to deliver by Settlement Day.

61. Upon information and belief, the price of Nanopierce stock fell because the Defendants' operation of the Stock Borrow Program facilitated or permitted the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares by Settlement Day.

62. The Defendants permitted certain sellers to maintain significant open fail to deliver positions of millions of shares of Nanopierce stock for extended periods of time well beyond Settlement Day by implementing the Stock Borrow Program to cover these open positions.

63. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants have artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

64. The artificially increased supply of Nanopierce shares in the marketplace created by Defendants' borrowing of Nanopierce shares through the Stock Borrow Program has significantly decreased the value of Nanopierce stock and Plaintiff Kolada's holding in Nanopierce stock. As a result, Plaintiff Kolada is damaged in an amount to be proven at trial.

G. DTCC

65. DTCC is a holding company which consists of four subsidiaries (one depository and three clearing corporations): the Depository Trust, the NSCC, the Fixed Income Clearing Corporation and the Emerging Markets Clearing Corporation.

66. DTCC, through its subsidiaries, provides clearance, settlement and information services for equities, corporate and municipal bonds, government and mortgage backed securities, over-the-counter credit derivatives and emerging market debt trades.

67. In 2003, the value of securities cleared and settled through the DTCC was stated to be $923.4 trillion. The DTCC's total revenue for 2003 was stated to be $947 million.

68. Upon information and belief, the DTCC, through its subsidiaries provides its services to Nevada corporations and residents.

H. Depository Trust

69. Depository Trust is a subsidiary of the DTCC. It is the world's largest securities depository and a clearinghouse for settlement of securities trading activity.

70. Depository Trust was formed 30 years ago to eliminate the physical movement of securities among brokerage firms on Wall Street to satisfy delivery requirements.

71. Financial organizations deliver securities on behalf of their customers through computerized bookkeeping records (also known as book-entry deliveries) at the Depository Trust without ever physically transferring the securities. In 2003, the value of book-entry deliveries processed by the Depository Trust was stated to be $105.7 trillion.

72. Depository Trust records the transfer of securities by book-entry by debiting the transferor's Depository Trust account and crediting the transferee's Depository Trust account.

73. Depository Trust also retains physical custody of stock certificates on behalf of its members. Stock certificates for registered securities deposited with the Depository Trust are held in the name of Cede & Co., Depository Trust's nominee name. As of December 31, 2003, the value of securities on deposit at the Depository Trust was stated to be $24.6 trillion and the number of depository-eligible securities was stated to be 2,227,000.

74. Upon information and belief, the Depository Trust provides its services to Nevada corporations and residents.

Appendix

I. NSCC

75. NSCC was created in 1976 as a result of the merger of three major clearing corporations (NYSE, AMEX, and NASD). In 2003, the total number of transactions processed by the NSCC was stated to be 4.7 billion with a value of $81.2 trillion.

76. NSCC, in conjunction with the Depository Trust, provides centralized clearance, settlement and information services for virtually all broker-to-broker equity, corporate bond and municipal bond, exchange-traded funds and unit investment trust trades that occur in the United States.

77. Upon information and belief, the NSCC provides its services to Nevada corporations and residents.

J. Continuous Net Settlement System

78. Transactions processed by the NSCC clear and settle through the Continuous Net Settlement System ("CNS System"). Sellers and buyers who clear and settle through the CNS System are required to be members of the NSCC and the Depository Trust ("Members").

79. NSCC guarantees completion of the transactions it processes through the CNS System by assuming (i) the obligation of the buyers to make payment to the sellers upon delivery of the shares, and (ii) the obligation of the sellers to deliver shares to the buyers.

Appendix

80. Each day during the daytime allocation cycle, the CNS System continually nets all trades of its Members by security to net long (purchase) and net short (sale) positions which are then further netted with closing positions carried forward from the previous trading day. The resulting net positions represent the quantity of each security due for settlement by the Members. A long position represents the quantity owed to the Members by the NSCC and a short position represents the quantity owed to the NSCC by the Members. After determination of a Member's long and short positions at the end of the daytime allocation cycle, the positions are passed to the Depository Trust for processing over the evening allocation cycle.

81. The short positions are compared to the Member's Depository Trust account to determine if the number of shares on deposit is sufficient to settle the short positions. If so, the shares are transferred from the Member's Depository Trust account to the NSCC's Depository Trust account. Shares received from Members in settlement of short positions are placed in the NSCC's Depository Trust account awaiting instructions from NSCC for delivery to the Depository Trust accounts of Members in long positions.

82. Based on instructions from the NSCC, as shares are received by the NSCC from Members with short positions, they are automatically allocated from the NSCC's Depository Trust accounts to the Depository Trust accounts of Members with long positions.

83. Early morning on the next business day, after regular evening allocation processing, the NSCC determines which open short positions are high-priority obligations. The NSCC then attempts to borrow shares through the Stock Borrow Program to satisfy these open positions.

K. Stock Borrow Program

84. The Stock Borrow Program allows the, NSCC to borrow available stocks from participating Members to cover short positions that remain open after a day's trade. These short positions are created by priority requests for allocation, buy-ins submitted by Members, the need to deliver against omnibus positions with other clearing corporations and by sellers' fails to deliver.

85. As provided in Addendum C-1 of the Rules and Procedures of the National Securities Clearing Corporation, (effective December 26, 2003), the process of the Stock Borrow Program is as follows:

(a) On a daily basis, Members who wish to participate in the Stock Borrow Program inform NSCC of the number of shares of each security that are available to be borrowed in their general unpledged account at the Depository Trust.

(b) Each morning, after the evening allocation cycle, the NSCC determines which short positions still remain open.

(c) If a short position remains open, the NSCC attempts to borrow securities from its Members to satisfy these open positions.

(d) The NSCC uses a formula to determine the order in which it will borrow securities from its Members and utilizes the full amount of shares available from one Member before borrowing from the next Member in sequence.

(e) When the shares are borrowed, the lending Member's Depository Trust account is debited by the number of borrowed shares. The borrowed shares are then credited to the NSCC's Depository Trust account and transferred to the buyer's Depository Trust account. The buyer acquires all right, title and interest in the borrowed shares, including the right to vote, receive dividends and resell the shares, without encumbrance or any reservation of rights.[4]

(f) The NSCC records the borrowing of the shares as a long position in a special CNS sub-account set up specifically for the lending Member's stock borrow activity.

(g) The NSCC credits the lending Member's regular CNS account with funds equivalent to the total current

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4. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

market value of the borrowed shares which the lending Member may invest to earn interest overnight.

(h) The NSCC also receives a fee from the Member who created the short position requiring the NSCC to borrow the shares through the Stock Borrow Program.

86. Shares borrowed by the NSCC are only returned when regular short deliveries from sellers for that day exceed priority needs in a particular security.

87. Through normal allocation to the CNS sub-account of the lending Members, borrowed shares which are returned are allocated to the lending Members' accounts at current market prices and the returned shares are transferred from the NSCC's Depository Trust account to the lending Member's Depository Trust account. The NSCC distributes reports to the lending Members each morning, reflecting stock borrow activity.

88. Membership in both the NSCC and Depository Trust is required in order to be a lender in the Stock Borrow Program. Lenders are selected based on a certain formula. Each day the lending Members are assigned a random allocation number for each security made available. A factor is developed for each lending Member by dividing the percentage of each lending Member's average loans as they relate to total NSCC borrowings by the percentage of each lending Member's average fees paid for trade comparison, trade recording and clearance as they relate to the total fees for all Members. Each random allocation number is then multiplied by

the factor to produce an adjusted random number per position for each lending Member. The lending Member with the lowest number will receive the first priority for borrowing.

L. The Dilutive Effects of the Stock Borrow Program

89. One of the effects of the Stock Borrow Program is to allow sellers to continue to fail to deliver because the NSCC can borrow shares from the Stock Borrow Program to cover the fail to deliver positions.

90. If the seller fails to deliver the sold shares on Settlement Day, a short position for that seller is created in the CNS System which is ultimately covered by the Stock Borrow Program either directly through the NSCC's daily allocation cycle or indirectly through a buy-in executed with shares borrowed through the Stock Borrow Program.

91. In the case of a buy-in, as set forth in the Rules and Procedures of the National Securities Clearing Corporation (effective December 26, 2003), when a seller fails to deliver, the buyer notifies the NSCC that it intends to buy-in the seller's fail to deliver position. However, instead of executing the buy-in by going into the market, the NSCC executes the buy-in by borrowing shares from lending Members of the Stock Borrow Program.

92. As a result, the Stock Borrow Program allows sellers to continue to fail to deliver because the Stock Borrow Program has effectively obviated the sellers' obligation to deliver and the buyers' right to buy-in through the market.

93. By borrowing shares through the Stock Borrow Program to cover fails to deliver, the Defendants have created tens of millions of unregistered illegal free trading shares of the issuer, artificially (1) increasing the supply of an issuer's shares in the marketplace; (2) driving down the price of the stock of the issuer; (3) devaluing the shareholders' holdings in an issuer's stock; and (4) causing multiple owners who purchase shares in separate transactions to own the same shares.

94. For example, assume that on April 1, Issuer has 100,000 issued and outstanding shares. On April 1, Seller S sells 1,000 shares of Issuer's stock to Buyer B. Seller S fails to deliver the 1,000 shares for settlement by April 4, which is Settlement Day. The NSCC then borrows 1,000 shares from Lender L through the Stock Borrow Program and delivers the 1,000 shares to Buyer B's Depository Trust account on April 4. Buyer B's Depository Trust account now reflects that Buyer B owns 1,000 shares. At the same time, since Lender L's loan of 1000 shares to the NSCC is not reported or visible to the marketplace, Lender L's NSCC account still reports that it owns the 1,000 shares that it lent to the NSCC. As a result, the marketplace now indicates that Issuer has 101,000 issued and outstanding shares, when in fact Issuer has NOT issued or authorized the additional 1,000

shares, These shares were artificially created by the NSCC when it borrowed 1,000 shares through the Stock Borrow Program and delivered them to Buyer B. Furthermore, two people now own the same 1,000 shares – Lender L and Buyer B.

95. Since the 1,000 shares received by Buyer B in the paragraph 58 illustration is now held in Buyer B's Depository Trust account, Buyer B can now lend the 1,000 shares to the NSCC through the Stock Borrow Program, thus, repealing the process and resulting in multiple shareholders owning the same shares. For example, assume that in a subsequent transaction on April 5, Seller S sells 750 shares of Issuer's stock to Buyer C. Seller S fails to deliver the 750 shares on April 8, Settlement Day. Therefore, the NSCC borrows 750 shares from Buyer B through the Stock Borrow Program and delivers the shares to Buyer C's Depository Trust account on April 8, which account now reflects that Buyer C owns 750 shares. In addition, since Buyer B's loan of 750 shares to the NSCC is not reported or visible to the marketplace, Buyer B's NSCC account still indicates that Buyer B owns the 750 shares which the NSCC borrowed for delivery to Buyer C. In sum, the marketplace now indicates that Issuer has 101,750 issued and outstanding shares, when in fact Issuer has NOT issued or authorized the additional 1,750 shares. These shares were artificially created by the NSCC when it borrowed 1,000 shares through the Stock Borrow Program for delivery to Buyer B and then borrowed 750 shares from Buyer B for delivery to Buyer C. Furthermore and most remarkably,

three people now own the same 750 shares – Lender L, Buyer B and Buyer C.

96. This process of recycling borrowed shares amounts to stock-kiting in that the same borrowed shares can continuously be transferred from a buyer and loaned to the NSCC for delivery to the next buyer who then loans the same shares to the NSCC and so forth. Thus, the same shares can be recycled repeatedly through the Stock Borrow Program to satisfy multiple delivery requirements.

97. The Stock Borrow Program allows the borrowed shares to be recycled repeatedly, resulting in the number of borrowed shares exceeding the number of shares issued and authorized by the issuer. In addition, upon information and belief, the number of borrowed shares exceeds the total number of issuer's shares actually on deposit at the Depository Trust.[5] Thus, upon information and belief, the Depository Trust owns and holds a significantly fewer number of lendable shares than the NSCC has borrowed through the Stock Borrow Program.

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5. As set forth in the letter from Ralph A. Lambaise, President, North American Securities Administrators Association, Inc., to Jonathan Katz, Secretary, Securities and Exchange Commission (January 5, 2004), the Securities and Exchange "Commission should explicitly prohibit the [Depository Trust] from lending more shares of a security than it actually holds."

98. This recycling of borrowed shares through the Stock Borrow Program could potentially result in a "run-on-the-bank" situation. If every shareholder (including shareholders who received borrowed shares) were to demand delivery of stock certificates by the Depository Trust, the custodian of the physical shares, there would be insufficient shares available for delivery because the Stock Borrow Program has artificially generated more shares than are physically held by the Depository Trust.

99. There is little incentive for the Defendants to force sellers to cure fail to deliver positions once the loan has been made because the Stock Borrow Program has become such a reliable source of income for the Defendants. For the year ended December 31, 2003, the Depository Trust reported revenues from services of $425,416,000 and the NSCC reported revenues from services of $293,133,000. In addition, open fail to deliver positions present a potential risk of loss to the Defendants because the NSCC covers these positions by borrowing shares through the Stock Borrow Program. At the close of business on December 31, 2003, the value of securities borrowed through the Stock Borrow Program was stated to be approximately $721,750,000. As a result, the NSCC, as borrower, has subjected itself to the possibility of significant financial losses if the seller is ultimately unable to honor its delivery obligations to the NSCC.

100. Through the Stock Borrow Program, the Defendants have permitted sellers to maintain fail to deliver positions of millions of shares for periods of a

year and even longer. This course of conduct by the Defendants has had the effect of creating tens of millions of additional unregistered illegal free trading shares of the issuer, artificially increasing the supply of shares in the marketplace and driving down and manipulating the price of the stock of numerous issuers, including Plaintiff Nanopierce.

AS AND FOR A FIRST CLAIM FOR RELIEF FOR VIOLATION OF NEVADA REVISED STATUTES 90.570 AND 90.660 MISREPRESENTATIONS AS TO THE NATURE OF THE STOCK BORROW PROGRAM

101. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 100 of the Complaint as if fully set forth herein.

102. Defendants have each misrepresented to the Plaintiffs that the NSCC is borrowing shares from lending Members of the Stock Borrow Program to cover fail to deliver positions in the clearing and settlement process, when, in fact, the transfer of shares from lending Members to the NSCC to cover such fail to deliver positions is actually a "sale" of securities. This transaction is actually a sale because the NSCC delivers the borrowed shares to the buyer who acquires all right, title and interest in the shares, including the right to vote, receive dividends and resell the shares, without further encumbrance or any reservation of rights.[6]

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6. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

103. The misrepresentations and omissions by the Defendants alleged above were false and misleading when made.

104. The misrepresentations and omissions of the Defendants as alleged above were material.

105. In making the misrepresentations and omissions, the Defendants acted with scienter. The Defendants have a major financial motivation to make the misrepresentations and omissions alleged herein because they have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public since questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

106. The misrepresentations and omissions by the Defendants were made in their Annual Statements, on their websites and various press releases issued to the investing public, which include the Plaintiffs.

107. In reliance upon these misrepresentations and omissions by Defendants, Plaintiffs traded Nanopierce shares, which trades were cleared and settled by and through the Defendants without knowledge of Defendants' violation of Nevada securities laws.

108. Alternatively, Plaintiffs relied on the Defendants' material and public misrepresentations and omissions and traded Nanopierce shares in the stock market

without knowledge of Defendants' fraud-on-the-market through the clearing and settlement services they provided.

109. DTCC, through its subsidiary, the NSCC and the Depository Trust, offers to sell and actually sells securities by means of communications which contain material misrepresentations and omissions, its violation of Nevada Revised Statutes 90.570 and NRS 90.660.

110. During the relevant period, the Defendants carried out a plan, scheme and course of conduct which was intended to, and throughout the period, did (i) deceive Plaintiffs; and (ii) cause Plaintiffs to purchase and/or sell Nanopierce shares at artificially depressed prices. In furtherance of this unlawful scheme, plan and course of conduct, Defendants each took the actions set forth herein which are in violation of Nevada Revised Statutes 90.570 and NRS 90.660.

111. The misrepresentations and omissions by the Defendants detailed above have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

112. As a result of the Defendants' violation of Nevada Revised Statutes 90.570 and NRS 90.660 and the wrongs herein alleged, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

Appendix

AS AND FOR A SECOND CLAIM FOR RELIEF FOR VIOLATION OF NEVADA REVISED STATUTES 90.570 AND 90.660 MISREPRESENTATIONS REGARDING THE CLEARING AND SETTLEMENT OF TRADES

113. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 112 of the Complaint as if fully set forth herein.

114. The Defendants have each represented to Plaintiffs that they efficiently clear and settle trades. In fact, the DTCC, the NSCC and the Depository Trust are not clearing and settling trades that result in open fail to deliver positions because these trades are processed through the Stock Borrow Program and therefore remain unsettled for extended periods of time.

115. In connection with its services to the marketplace, the DTCC, itself and by and through the NSCC and the Depository Trust, made the following representations to Plaintiffs on its Annual Statements, its websites and various press releases:

(i) that through the CNS System, it maintains an orderly flow of security and money balances;

(ii) that through the Stock Borrow Program, Members lend NSCC stock from their accounts at the Depository Trust to cover temporary shortfalls in the CNS System; and

(iii) that securities loaned to the NSCC through the Stock Borrow Program enable the NSCC to satisfy CNS delivery obligations not filled through normal deliveries.

116. Notwithstanding these representations, upon information and belief, the Defendants are each aware that sellers routinely fail to deliver securities and that unfulfilled obligations to deliver securities can have negative effects on the market when fails to deliver persist for an extended period of time.

117. Further, the Defendants are each aware that Open fail to deliver positions covered by shares borrowed through the Stock Borrow Program actually increase the supply of shares in the marketplace by the number of shares borrowed, resulting in the artificial inflation of the issued and outstanding shares of issuers.

118. By utilizing the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock and consequently creating artificial Nanopierce shares, the Defendants have misrepresented to Plaintiffs that these artificial shares are issued and outstanding shares of Nanopierce, when in fact these shares have not been issued or authorized by Nanopierce. This misrepresentation by the Defendants adversely affected the sale of Nanopierce stock and was relied upon by Plaintiffs when deciding to purchase and/or sell Nanopierce shares.

119. The representations and omissions by the Defendants alleged above were false and misleading when made.

120. In making the misrepresentations and omissions, the Defendants acted with scienter. The Defendants have a major financial motivation to make the misrepresentations and omissions alleged herein because they have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public since questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

121. Defendants' misrepresentations and omissions, as alleged above were material.

122. In reliance upon these misrepresentations and omissions by Defendants, Plaintiffs traded Nanopierce shares, which trades were cleared and settled by and through the Defendants without knowledge of Defendants' violation of Nevada securities laws.

123. Alternatively, Plaintiffs relied on Defendants' material and public misrepresentations and omissions and traded Nanopierce shares in the stock market without knowledge of Defendants' fraud-on-the-market through statements they made about the clearing and settlement services they provided.

124. The Plaintiffs have suffered substantial damages from the Defendants' misrepresentation that they use the Stock Borrow Program to efficiently clear and settle trades, when in fact they are not using the Stock Borrow Program to clear and settle trades efficiently but rather

to mask inefficiencies in their clearance and settlement process by covering open fail to deliver positions with borrowed shares for millions of shares and extended periods of time. As a result, the Defendants have created additional unregistered and unauthorized Nanopierce shares and artificially increased the supply of Nanopierce shares in the marketplace and decreased the stock's value.

125. The misrepresentations and omissions by the Defendants detailed above are in violation of Nevada Revised Statutes 90.570 and NRS 90.660 and have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

126. As a result of the Defendants' violation of Nevada Revised Statutes 90.570 and NRS 90.660 and the wrongs herein alleged, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

AS AND FOR A THIRD CLAIM FOR RELIEF FOR VIOLATION OF NEVADA REVISED STATUTES 90.570 AND 90.660 MISREPRESENTATIONS AS TO THE NUMBER OF SHARES HELD IN LENDING MEMBERS' NSCC AND DEPOSITORY TRUST ACCOUNTS

127. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 126 of the Complaint as if fully set forth herein.

128. The Defendants have misrepresented to Plaintiffs the number of Nanopierce shares actually held by the lending Members at the Depository Trust by providing misleading information in the lending Members' Depository Trust and NSCC account statements.

129. When shares are borrowed by the NSCC from a lending Member, the lending Member's Depository Trust account reflects a debit of the number and value of the shares borrowed and a balance which is minus the borrowed shares. The borrowed shares are credited to a separate account that reflects all the shares loaned by the lending Member. However, because the Depository Trust records the borrowing by balancing the aforementioned two accounts, the lending Member's total Depository Trust account is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's Depository Trust account misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

130. Further, the NSCC records the borrowing of the shares by balancing the lending Member's CNS sub-accounts,[7] so that the net change in holdings of the

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7. The NSCC records the borrowing of the shares by creating a miscellaneous activity entry in the lending Member's CNS sub-accounts. The number of shares borrowed is journaled in the lending Member's CNS sub-account as a short position to show the delivery obligation of the lending Member to the NSCC for the number and value of the borrowed shares. This short position

(Cont'd)

lending Member is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's NSCC account statement misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

131. But for Defendants' inaccurate and misleading accounting of the borrowed shares, the number of shares borrowed would not exceed the number of lendable shares on deposit with the Depository Trust.

132. The representations and omissions by the Defendants alleged above were false and misleading when made.

133. In making the misrepresentations and omissions, the Defendants acted with scienter. The Defendants have a major financial motivation to make the misrepresentations and omissions alleged herein because they have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public since questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust

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(Cont'd)

is automatically covered by taking the shares on deposit in the lending Member's Depository Trust account. A separate journal entry is made in another sub-account of the lending Member as a long position to show the number and value of the shares due to be returned by the NSCC to the lending Member. The long position is adjusted daily to reflect the market value of the borrowed shares.

and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

134. The misrepresentations and omissions of the Defendants, as alleged above, were material.

135. In reliance upon these misrepresentations and omissions by Defendants, Plaintiffs traded Nanopierce shares, which trades were cleared and settled by and through the Defendants and without knowledge of Defendants' violation of Nevada securities laws.

136. Alternatively, Plaintiffs relied on Defendants' material and public misrepresentations and omissions and traded Nanopierce shares in the stock market without knowledge of Defendants' fraud-on-the-market through the clearing and settlement services they provided.

137. The misrepresentations and omissions by the Defendants detailed above are in violation of Nevada Revised Statutes 90.570 and NRS 90.660 and have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

138. As a result of the Defendants' violation of Nevada Revised Statutes 90.570 and NRS 90.660 and the wrongs herein alleged, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

AS AND FOR A FOURTH CLAIM FOR RELIEF FOR VIOLATION OF NEVADA REVISED STATUTES 90.570 AND 90.660 MISREPRESENTATIONS AS TO THE OPERATION OF THE STOCK BORROW PROGRAM

139. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 138 of the Complaint as if fully set forth herein.

140. The Defendants have represented to Plaintiffs that open fail to deliver positions will be cured by buying in the open positions with shares purchased from the marketplace, when in fact, these open positions are actually cured with shares borrowed from lending Members through the Stock Borrow Program.

141. As set forth in the Rules and Procedures of the National Securities Clearing Corporation (effective December 26, 2003), when a seller fails to deliver, the buyer notifies the NSCC that it intends to buy-in the seller's fail to deliver position. Instead of executing the buy-in by going into the market, the NSCC executes the buy-in by borrowing shares from lending Members of the Stock Borrow Program to satisfy the buyer's buy-in request and to cover the seller's fail to deliver position.

142. The representations and omissions by the Defendants alleged above were false and misleading when made.

143. In making the misrepresentations and omissions, the Defendants acted with scienter. The Defendants have

a major financial motivation to make the misrepresentations and omissions alleged herein because they have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public since questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

144. The misrepresentations and omissions of the Defendants, as alleged above, were material.

145. In reliance upon these misrepresentations and omissions by Defendants, Plaintiffs traded Nanopierce shares, which trades were cleared and settled through Defendants without knowledge of Defendants' violation of Nevada securities laws.

146. Alternatively, Plaintiffs relied on Defendants' material and public misrepresentations and omissions and traded Nanopierce shares in the stock market without knowledge of Defendants' fraud-on-the-market through the clearing and settlement services they provided.

147. The misrepresentations and omissions by the Defendants detailed above are in violation of Nevada Revised Statutes 90.570 and NRS 90.660 and have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

148. As a result of the Defendants' violation of Nevada Revised Statutes 90.570 and NRS 90.660 and the wrongs herein alleged, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

AS AND FOR A FIFTH CLAIM FOR RELIEF FOR VIOLATION OF NEVADA REVISED STATUTES 90.580 AND 90.660 MARKET MANIPULATION

149. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 148 of the Complaint as if fully set forth herein.

150. Prior to the establishment of the Stock Borrow Program, the Defendants executed buy-ins by purchasing shares from the open market to cover open fail to deliver positions. These transactions involved a change in beneficial ownership of the affected shares and constituted a purchase and sale of securities which was reported and visible to the marketplace.

151. Since the institution of the Stock Borrow Program and as set forth in Addendum C-1, Rules and Procedures of the National Securities Clearing Corporation (effective December 26, 2003), instead of executing buy-ins by purchasing shares from the open market, the NSCC now executes buy-ins by borrowing shares through the Stock Borrow Program. When a buy-in is executed using shares borrowed through the Stock Borrow Program, the transaction is not reported or visible to the marketplace. This is because the transaction characterized by the NSCC as a loan under

the Stock Borrow Program does not involve a change in beneficial ownership, since borrowed shares are not deducted from a lending Member's total Depository Trust and NSCC account holdings.

152. The purpose of executing buy-ins by borrowing shares through the Stock Borrow Program instead of purchasing shares from the open market is to create a false and misleading appearance with respect to the market for Nanopierce stock.

153. By lending shares to sellers who have failed to deliver, the Defendants have manipulated the market by effecting a transaction in Nanopierce securities which involves no change in the beneficial ownership of the security for the purpose of creating a false or misleading appearance with respect to the market for Nanopierce stock.

154. The Defendants' execution of buy-ins with shares borrowed through the Stock Borrow Program is in violation of Nevada Revised Statutes 90.580 and NRS 90.660 and has damaged and injured the Plaintiffs.

155. As a result of the Defendants' violation of Nevada Revised Statutes 90.580 and NRS 90.660 and the wrongs herein alleged, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

Appendix

AS AND FOR A SIXTH CLAIM FOR RELIEF FOR VIOLATION OF SECTION 598A.060 OF THE NEVADA UNFAIR TRADE PRACTICES ACT

156. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 155 of the Complaint as if fully set forth herein.

157. DTCC, through its subsidiaries, the NSCC and the Depository Trust, provides clearance and settlement services for its members.

158. The Stock Borrow Program purportedly improves the efficiency of the clearance and settlement function by addressing temporary fail to deliver situations. Under the Stock Borrow Program, if a seller fails to deliver shares on Settlement Day, the NSCC borrows the shares from willing lenders and gives the shares to the buyer in settlement of the trade. Membership in both the NSCC and Depository Trust is required in order to be a lender in the Stock Borrow Program.

159. The clearance and settlement services provided by the Defendants are completely separate and distinct from the functions of the Stock Borrow Program, and there is a separate market and demand for each of them.

160. The Defendants have illegally tied the Stock Borrow Program to the separate and distinct functions of clearing and settling stock trades by requiring that open fail to deliver positions be covered with shares borrowed through the Stock Borrow Program, either

directly through the NSCC's daily allocation cycle or indirectly through a buy-in executed with shares borrowed through the Stock Borrow Program.

161. The purpose and effect of this tying arrangement is to prevent buyers from entering the stock market to purchase shares to buy in open fail to deliver positions at competitive market prices, and instead requiring buyers to execute buy-ins through the Stock Borrow Program.

162. The conduct of the Defendants is anticompetitive since they have prevented buyers from entering the stock market to purchase shares to cover open fail to deliver positions, thereby unreasonably restraining competition in the market and violating the Nevada Unfair Trade Practices Act.

163. The tying arrangement is anticompetitive because it diverts to the Defendants the buyers' demand for shares to cover open fail to deliver positions by requiring buy-ins for open fail to deliver positions to be filled with shares borrowed through the Stock Borrow Program instead of allowing the demand to be filled by all market participants through buying in from the stock market.

164. The value of Nanopierce shares on the open market has been reduced by the Defendants' anticompetitive behavior because the supply of shares from buy-ins executed through the Stock Borrow Program is limited to lending Members rather than the open market of securities sellers as a whole. A buy-in executed by

entering the stock market includes all market participants and is based on the natural supply and demand for the borrowed security.

165. If the clearance and settlement functions of the Defendants were not tied to the Stock Borrow Program, buyers would be able to buy-in open fail to deliver positions by going into the stock market instead of having to execute their buy-in request through the Stock Borrow Program.

166. In addition, the transaction which underlies the Stock Borrow Program is actually a "sale" of securities by a member to the NSCC. This transaction is a sale because the NSCC delivers the borrowed shares to the buyer who acquires all right, title and interest in the shares, including the right to vote, receive dividends and resell the shares, without further encumbrance or any reservation or rights.[8] The Defendants have intentionally mischaracterized this transaction as a "loan" in order to disguise the anticompetitive nature of the transaction.

167. As a result of the Defendants' anticompetitive conduct in tying the Stock Borrow Program to the separate and distinct functions of clearing and settling stock trades, upon information and belief, buyers of Nanopierce shares in trades which resulted in open fail

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8. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

to deliver positions were prevented from entering the stock market to buy-in shares to cover these positions. Instead, these fail to deliver positions were required to be covered by shares borrowed through the Stock Borrow Program.

168. By requiring that buyers buy-in open fail to deliver positions with shares borrowed through the Stock Borrow Program and accepting delivery of t borrowed shares, the Defendants have artificially created unregistered, free trading Nanopierce shares and have increased the supply of Nanopierce shares in the marketplace without authority.

169. The artificially increased supply of Nanopierce shares in the marketplace created by the Defendants' anticompetitive conduct in tying the Stock Borrow Program to the separate and distinct functions of clearing and settling stock trades has significantly decreased the value of Nanopierce stock and Plaintiffs' holdings in Nanopierce stock.

170. The foregoing acts and practices, and the continuing course of the Defendants' anticompetitive conduct, have harmed the Plaintiffs.

171. The Defendants' conduct is anticompetitive. There are no procompetitive effects of this tying arrangement that might outweigh the harm to competition in the stock market.

172. As a direct result of the Defendants' illegal conduct, competition in the stock market has been restrained and suppressed.

173. Defendants' anticompetitive and exclusionary conduct has directly and proximately caused injury to Plaintiff Nanopierce's businesses and property and Plaintiffs Seitz's, Plaintiff Knight-McConnell's, Plaintiff Stock's, Plaintiff O'Sullivan's and Plaintiff Kolada's property as set forth above. Plaintiffs' injuries are the type the Nevada Unfair Trade Practices Act is intended to prevent and thus constitute unfair trade practice injuries.

174. As a result of the Defendants' violation of the Nevada Unfair Trade Practices Act and the wrongs herein alleged, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

As and For a Seventh Claim for Relief for Negligent Misrepresentations as to the Nature of the Stock Bonus Program

175. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 174 of the Complaint as if fully set forth herein.

176. Defendants have misrepresented to Plaintiffs that the Stock Borrow Program is a "loan" of shares from participating members of the Stock Borrow Program to cover fail to deliver positions in the clearing and settlement process.

177. Defendants have failed to exercise reasonable care or competence in communicating to Plaintiffs that the NSCC is borrowing shares from lending Members

through the Stock Borrow Program to cover fail to deliver positions in the clearing and settlement process, when, in fact, the transfer of shares from lending Members to the NSCC to cover such fail to deliver positions is actually a "sale" of securities. This transaction is a sale because the NSCC delivers the borrowed shares to the buyer who acquires all right, title and interest in the shares, including the right to vote, receive dividends and resell the shares, without further encumbrance or any reservation of rights.[9]

178. The representations and omissions by the Defendants alleged above were false and misleading when made.

179. The misrepresentations and omissions by Defendants to Plaintiffs were made in their Annual Statements, on their websites and in various press releases.

180. The Defendants have a major financial motivation to make the misrepresentations and omissions. The Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

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9. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

181. The misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

182. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

AS AND FOR AN EIGHTH CLAIM FOR RELIEF FOR NEGLIGENT MISREPRESENTATIONS REGARDING THE CLEARING AND SETTLEMENT OF TRADES

183. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 182 of the Complaint as if fully set forth herein.

184. The Defendants have failed to exercise reasonable care or competence in communicating to Plaintiffs that they efficiently clear and settle trades. In fact, the Defendants are not clearing and settling those trades which result in open fail to deliver positions, because these trades are processed through the Stock Borrow Program and remain unsettled for extended periods of time.

185. In connection with its services to the marketplace, the DTCC, itself and by and through the NSCC and the Depository Trust, have further communicated to Plaintiffs the following representations on its Annual Statements, its websites and various press releases:

(i) that through the CNS System, it maintains an orderly flow of security and money balances;

(ii) that through the Stock Borrow Program, Members lend NSCC stock from their accounts at the Depository Trust to cover temporary shortfalls in the CNS System; and

(iii) that securities loaned to the NSCC through the Stock Borrow Program, enable the NSCC to satisfy CNS delivery obligations not filled through normal deliveries.

186. Notwithstanding these representations, upon information and belief, the Defendants are aware that sellers routinely fail to deliver securities on Settlement Day and that unfulfilled obligations to deliver securities can have negative effects on the market when fails to deliver persist for an extended period of time.

187. Further, the Defendants are aware that open fail to deliver positions covered by shares borrowed through the Stock Borrow Program actually increase the supply of shares in the marketplace by the number of shares borrowed, resulting in the artificial inflation of the issued and outstanding shares of the issuer.

188. By utilizing the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock and consequently creating artificial Nanopierce shares, the Defendants have negligently misrepresented to Plaintiffs that these artificial shares are issued and outstanding shares of Nanopierce, when in fact these

shares have not been issued or authorized by Nanopierce. This misrepresentation by the Defendants adversely affected the sale of Nanopierce stock and was justifiably relied upon by Plaintiffs when deciding to purchase and/or sell Nanopierce shares.

189. The representations and omissions by the Defendants alleged above were false and misleading when made.

190. Defendants have a major financial motivation to make the misrepresentations and omissions alleged above. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

191. The Plaintiffs have suffered substantial damages from the Defendants' misrepresentation that they use the Stock Borrow Program to efficiently clear and settle trades, when in fact they are not using the Stock Borrow Program to clear and settle trades efficiently but rather to mask inefficiencies in their clearance and settlement process by covering open fail to deliver positions with borrowed shares involving millions of shares for extended periods of time. As a result, the Defendants have created additional unregistered and unauthorized Nanopierce shares and have artificially increased the supply of Nanopierce shares in the marketplace and decreased the value of said stock.

192. The negligent misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

193. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

AS AND FOR A NINTH CLAIM FOR RELIEF FOR NEGLIGENT MISREPRESENTATIONS AS TO THE NUMBER OF SHARES HELD IN LENDING MEMBERS' NSCC AND DEPOSITORY TRUST ACCOUNTS

194. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 193 of the Complaint as if fully set forth herein.

195. Defendants have failed to exercise reasonable care or competence in communicating to Plaintiffs the number of Nanopierce shares actually held by the lending Members at the Depository Trust by providing misleading information in the lending Members' Depository Trust and NSCC account statements.

196. When shares are borrowed by the NSCC from a lending Member, the lending Member's Depository Trust account reflects a debit of the number and value of the shares borrowed and a balance which is minus the borrowed shares. The borrowed shares are credited to a separate account that reflects all the shares loaned by

the lending Member. However, because the Depository Trust records the borrowing by balancing the aforementioned two accounts, the lending Member's total Depository Trust account is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's Depository Trust account misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

197. Further, the NSCC records the borrowing of the shares by balancing the lending Member's CNS sub-accounts,[10] so that the net change in holdings of the lending Member is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's NSCC account statement misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

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10. The NSCC records the borrowing of the shares by creating a miscellaneous activity entry in the lending Member's CNS sub-accounts. The number of shares borrowed is journaled in the lending Member's CNS sub-account as a short position to show the delivery obligation of the lending Member to the NSCC for the number and value of the borrowed shares. This short position is automatically covered by taking the shares on deposit in the lending Member's Depository Trust acount. A separate journal entry is made in another sub-account of the lending Member as a long position to show the number and value of the shares due to be returned by the NSCC to the lending Member. The long position is adjusted daily to reflect the market value of the borrowed shares.

198. But for Defendants' inaccurate and misleading accounting of the borrowed shares, the number of shares borrowed would not exceed the number of lendable shares on deposit with the Depository Trust.

199. The representations and omissions by the Defendants alleged above were false and misleading when made.

200. Defendants have a major financial motivation to make the misrepresentations and omissions alleged above.

201. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

202. The negligent misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

203. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

Appendix

AS AND FOR A TENTH CLAIM FOR RELIEF FOR NEGLIGENT MISREPRESENTATIONS AS TO THE OPERATION OF THE STOCK BORROW PROGRAM

204. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 203 of the Complaint as if fully set forth herein.

205. Defendants have failed to exercise reasonable care or competence in communicating to Plaintiffs that open fail to deliver positions will be cured by buying in the open positions with shares purchased from the marketplace, when in fact, these open positions are actually cured with shares borrowed from lending Members through the Stock Borrow Program.

206. As set forth in the Rules and Procedures of the National Securities Clearing Corporation (effective December 26, 2003), when a seller fails to deliver, the buyer notifies the NSCC that it intends to buy-in the seller's fail to deliver position. Instead of executing the buy-in by going into the market, the NSCC executes the buy-in by borrowing shares from lending Members of the Stock Borrow Program to satisfy the buyer's buy-in request and to cover the seller's fail to deliver position.

207. The representations and omissions by the Defendants alleged above were false and misleading when made.

208. Defendants have a major financial motive to allow the misrepresentations and omissions to be made.

209. Defendants have a major economic incentive to keep knowledge of the fail to deliver problem out of the awareness of the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

210. The negligent misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

211. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

As and For an Eleventh Claim for Relief for Intentional Misrepresentations as to the Nature of the Stock Borrow Program

212. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 211 of the Complaint as if fully set forth herein.

213. Defendants have willfully and/or recklessly represented to Plaintiffs that the NSCC is borrowing shares from lending Members of the Stock Borrow Program to cover fail to deliver positions in the clearing

and settlement process, when, in fact, the transfer of shares from lending Members to the NSCC to cover such fail to deliver positions is actually a "sale" of securities. This transaction is a sale because the NSCC delivers the borrowed shares to the buyer who acquires all right, title and interest in the shares, including the right to vote, receive dividends and resell the shares, without further encumbrance or any reservation of rights.[11]

214. The representations and omissions by Defendants alleged above were false and misleading when made.

215. The misrepresentations and omissions by Defendants were willfully and/or recklessly made in their Annual Statements, on their websites and in various press releases issued to the investing public, which include the Plaintiffs.

216. Defendants have a major financial motivation to make the misrepresentations and omissions. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

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11. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

217. The intentional misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

218. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

As and For a Twelfth Claim for Relief for Intentional Misrepresentations Regarding the Clearing and Settlement of Trades

219. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 218 of the Complaint as if fully set forth herein.

220. Defendants have willfully and/or recklessly misrepresented to Plaintiffs that they efficiently clear and settle trades. In fact, the Defendants are not clearing and settling those trades which result in open fail to deliver positions because these trades are processed through the Stock Borrow Program and remain unsettled for extended periods of time.

221. In connection with its services to the marketplace, the Defendants have further willfully and/or recklessly represented to Plaintiffs the following representations on its Annual Statements, its websites and various press releases:

(i) that through the CNS System, it maintains an orderly flow of security and money balances;

(ii) that through the Stock Borrow Program, Members lend NSCC stock from their accounts at the Depository Trust to cover temporary shortfalls in the CNS System; and

(iii) that securities loaned to the NSCC through the Stock Borrow Program, enable the NSCC to satisfy CNS delivery obligations not filled through normal deliveries.

222. Notwithstanding these representations, upon information and belief, the Defendants are aware that sellers routinely fail to deliver securities on required Settlement Days and that unfulfilled obligations to deliver securities can have negative effects on the market when fails to deliver persist for an extended period of time.

223. Further, the Defendants are aware that open fail to deliver positions covered by shares borrowed through the Stock Borrow Program actually increase the supply of shares in the marketplace by the number of shares borrowed, resulting in the artificial inflation of the issued and outstanding shares of the issuer.

224. By utilizing the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock and consequently create artificial Nanopierce shares, the Defendants have misrepresented to the Plaintiffs that these artificial shares are issued and outstanding shares

of Nanopierce, when in fact these shares have not been issued or authorized by Nanopierce. This misrepresentation by the Defendants adversely affected the sale of Nanopierce stock and was justifiably relied upon by Plaintiffs when making decisions to purchase and/or sell Nanopierce shares.

225. The representations and omissions by Defendants alleged above were false and misleading when made.

226. Defendants have a major financial motivation to make the misrepresentations and omissions. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

227. The Plaintiffs have suffered substantial damages from the Defendants' willful and/or reckless misrepresentation that they use the Stock Borrow Program to efficiently settle and clear trades, when in fact they are not using the Stock Borrow Program to clear and settle trades efficiently but rather to mask inefficiencies in their clearance and settlement process by covering open fail to deliver positions with borrowed shares for millions of shares and extended periods of time. As a result, the Defendants have created additional unregistered and unauthorized Nanopierce shares artificially increasing the supply of Nanopierce shares in the marketplace and decreasing the value of the stock.

228. The intentional misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

229. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

As and For a Thirteenth Claim for Relief for Intentional Misrepresentations as to the Number of Shares Held in Lending Members' NSCC and Depository Trust Accounts

230. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 229 of the Complaint as if fully set forth herein.

231. Defendants have willfully and/or recklessly misrepresented to Plaintiffs the number of Nanopierce shares actually held by the lending Members at the Depository Trust by providing misleading information in the lending Members' Depository Trust and NSCC account statements.

232. When shares are borrowed by the NSCC from a lending member, the lending Member's Depository Trust account reflects a debit of the number and value of the shares borrowed and a balance which is minus the borrowed shares. The borrowed shares are credited to a separate account that reflects all the shares loaned by

the lending Member. However, because the Depository Trust records the borrowing by balancing the aforementioned two accounts, the lending Member's total Depository Trust account is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's Depository Trust account misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

233. Further, the NSCC records the borrowing of the shares by balancing the lending Member's CNS sub-accounts,[12] so that the net change in holdings of the lending Member is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's NSCC account statement misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

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12. The NSCC records the borrowing of the shares by creating a miscellaneous activity entry in the lending Member's CNS sub-accounts. The number of shares borrowed is journaled in the lending Member's CNS sub-account as a short position to show the delivery obligation of the lending Member to the NSCC for the number and value of the borrowed shares. This short position is automatically covered by taking the shares on deposit in the lending Member's Depository Trust account. A separate journal entry is made in another sub-account of the lending Member as a long position to show the number and value of the shares due to be returned by the NSCC to the lending Member. The long position is adjusted daily to reflect the market value of the borrowed shares.

234. But for Defendants' willful and/or reckless inaccurate and misleading accounting of the borrowed shares, the number of shares borrowed would not exceed the number of lendable shares on deposit with the Depository Trust.

235. The representations and omissions by Defendants alleged above were false and misleading when made.

236. Defendants have a major financial motivation to make the misrepresentations and omissions. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

237. The intentional misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

238. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

Appendix

As and For a Fourteenth Claim for Relief for Intentional Misrepresentations as to the Operation of the Stock Borrow Program

239. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 238 of the Complaint as if fully set forth herein.

240. Defendants have willfully and/or recklessly misrepresented to Plaintiffs that open fail to deliver positions will be cured through buy-ins, when in fact, these fail to deliver positions are actually cured by borrowing shares from lending Members through the Stock Borrow Program.

241. As set forth in the Rules and Procedures of the National Securities Clearing Corporation (effective December 26, 2003), when a seller fails to deliver, the buyer notifies the NSCC that it intends to buy-in the seller's fail to deliver position. Instead of executing the buy-in by going into the market, the NSCC executes the buy-in by borrowing shares from lending Members of the Stock Borrow Program to satisfy the buyer's buy-in request and to cover the seller's open fail to deliver position.

242. The representations and omissions by Defendants alleged above were false and misleading when made.

243. Defendants have a major financial motive to allow the misrepresentations and omissions to be made. Defendants have a major economic incentive to keep

knowledge of the fail to deliver problem out of the awareness of the investing public because questions or doubts as to the efficiency of the DTCC, NSCC, Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

244. The intentional misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which justifiably relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

245. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

As and For a Fifteenth Claim for Relief for Fraudulent Misrepresentations as to the Nature of the Stock Borrow Program

246. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 245 of the Complaint as if fully set forth herein.

247. Defendants have fraudulently represented to Plaintiffs that the NSCC is borrowing shares from lending Members of the Stock Borrow Program to cover fail to deliver positions in the clearing and settlement process, when, in fact, the transfer of shares from lending Members to the NSCC to cover such fail to deliver positions is actually a "sale" of securities. This transaction is a sale because the NSCC delivers the

borrowed shares to the buyer who acquires all right, title and interest in the shares, including the right to vote, receive dividends and resell the shares, without further encumbrance or any reservation of rights.[13]

248. The representations and omissions by Defendants alleged above were false and misleading when made.

249. The misrepresentations and omissions by Defendants were made in their Annual Statements, on their websites and in various press releases issued to the investing public, which include the Plaintiffs.

250. Defendants have a major financial motivation to make the misrepresentations and omissions. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, the NSCC, the Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

251. The fraudulent misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

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13. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requireents (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

252. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

AS AND FOR A SIXTEENTH CLAIM FOR RELIEF FOR FRAUDULENT MISREPRESENTATIONS REGARDING THE CLEARING AND SETTLEMENT OF TRADES

253. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 252 of the Complaint as if fully set forth herein.

254. Defendants have fraudulently represented to Plaintiffs that they efficiently clear and settle trades. In fact, Defendants are not clearing and settling those trades which result in open "fail to deliver," positions because those trades are processed through the Stock Borrow Program and therefore remain unsettled for extended periods of time.

255. In connection with its services to the marketplace, the Defendants have further falsely represented to Plaintiffs the following representations on its Annual Statements, its websites and various press releases:

(i) that through the CNS System, it maintains an orderly flow of security and money balances;

(ii) that through the Stock Borrow Program, Members lend NSCC stock from their accounts at the Depository Trust to cover temporary shortfalls in the CNS System; and

(iii) that securities loaned to the NSCC through the Stock Borrow Program, enable the NSCC to satisfy CNS delivery obligations not filled through normal deliveries.

256. Notwithstanding these representations, upon information and belief, the Defendants are aware that sellers routinely fail to deliver securities on required Settlement Days and that unfulfilled obligations to deliver securities can have negative effects on the market when fails to deliver persist for an extended period of time.

257. Further, the Defendants are aware that open fail to deliver positions covered by shares borrowed through the Stock Borrow Program actually increase the supply of shares in the marketplace by the number of shares borrowed, resulting in the artificial inflation of the issued and outstanding shares of the issuer.

258. By utilizing the Stock Borrow Program to cover open fail to deliver positions in Nanopierce stock and consequently create artificial Nanopierce shares, the Defendants have misrepresented to the Plaintiffs that these artificial shares are issued and outstanding shares of Nanopierce, when in fact these shares have not been issued or authorized by Nanopierce. This misrepresentation by the Defendants adversely affected the sale of Nanopierce stock and was relied upon by Plaintiffs when making decisions to purchase and/or sell Nanopierce shares.

259. The representations and omissions by Defendants alleged above were false and misleading when made.

260. Defendants have a major financial motivation to make the misrepresentations and omissions. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, NSCC, Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

261. The Plaintiffs have suffered substantial damages as a result of the Defendants' misrepresentation that they use the Stock Borrow Program to efficiently settle and clear trades, when in fact they are not using the Stock Borrow Program to clear and settle trades efficiently but rather to mask inefficiencies in their clearance and settlement process by covering open fail to deliver positions with borrowed shares for millions of shares and extended periods of time. As a result, the Defendants have created additional unregistered and unauthorized Nanopierce shares and have artificially increased the supply of Nanopierce stock in the marketplace and decreased the value of the stock.

262. The fraudulent misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

263. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

As and For a Seventeenth Claim for Relief for Fraudulent Misrepresentations as to the Number of Shares Held in Lending Members' NSCC and Depository Trust Accounts

264. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 263 of the Complaint as if fully set forth herein.

265. Defendants have fraudulently represented to Plaintiffs the number of Nanopierce shares actually held by the lending Members at the Depository Trust by providing misleading information in the lending Members' Depository Trust and NSCC account statements.

266. When shares are borrowed by the NSCC from a lending Member, the lending Member's Depository Trust account reflects a debit of the number and value of the shares borrowed and a balance which is minus the borrowed shares. The borrowed shares are credited to a separate account that reflects all the shares loaned by the lending Member. However, because the Depository Trust records the borrowing by balancing the aforementioned two accounts, the lending Member's total Depository Trust account is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's

Depository Trust account misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

267. Further, the NSCC records the borrowing of the shares by balancing the lending Member's CNS sub-accounts,[14] so that the net change in holdings of the lending Member is not reduced to exclude the number and value of the loaned shares. Therefore, when shares are borrowed, the lending Member's NSCC account statement misleadingly reflects an amount and value of shares that are not actually held by the lending Member at the Depository Trust.

268. But for Defendants' false and misleading accounting of the borrowed shares, the number of shares borrowed would not exceed the number of lendable shares on deposit with the Depository Trust.

269. The representations and omissions by Defendants alleged above were false and misleading when made.

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14. The NSCC records the borrowing of the shares by creating a miscellaneous activity entry in the lending Member's CNS sub-accounts. The number of shares borrowed is journaled in the lending Member's CNS sub-account as a short position to show the delivery obligation of the lending Member to the NSCC for the number and value of the borrowed shares. This short position is automatically covered by taking the shares on deposit in the lending Member's Depository Trust account. A separate journal entry is made in another sub-account of the lending Member as a long position to show the number and value of the shares due to be returned by the NSCC to the lending Member. The long position is adjusted daily to reflect the market value of the borrowed shares.

270. Defendants have a major financial motivation to make the misrepresentations and omissions. Defendants have a significant economic incentive to keep knowledge of the fail to deliver problem away from the investing public because questions or doubts as to the efficiency of the DTCC, NSCC, Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

271. The fraudulent misrepresentations and omissions by the Defendants detailed above have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

272. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

As and For an Eighteenth Claim for Relief for Fraudulent Misrepresentations as to the Operation of the Stock Borrow Program

273. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 272 of the Complaint as if fully set forth herein.

274. Defendants have fraudulently represented to Plaintiffs that open fail to deliver positions will be cured by buying in the open positions with shares purchased from the marketplace, when in fact, these open positions are actually cured with shares borrowed from lending Members through the Stock Borrow Program.

275. As set forth in the Rules and Procedures of the National Securities Clearing Corporation (effective December 26, 2003), when a seller fails to deliver, the buyer notifies the NSCC that it intends to buy-in the seller's fail to deliver position. Instead of executing the buy-in by going into the market, the NSCC executes the buy-in by borrowing shares from lending Members of the Stock Borrow Program to satisfy the buyer's buy-in request and to cover the seller's open fail to deliver position.

276. The representations and omissions by Defendants alleged above were false and misleading when made.

277. Defendants have a major financial motive to allow the misrepresentations and omissions to be made. Defendants have a major economic incentive to keep knowledge of the fail to deliver problem out of the awareness of the investing public because questions or doubts as to the efficiency of the DTCC, NSCC, Depository Trust and their systems would jeopardize the $947 million fee-based revenues generated by the DTCC.

278. The fraudulent misrepresentations and omissions by Defendants detailed above have damaged and injured Plaintiffs, which relied on those misrepresentations and omissions in connection with the purchase and/or sale of Nanopierce shares.

279. Plaintiffs have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proven at trial.

Appendix

AS AND FOR A NINETEENTH CLAIM FOR RELIEF FOR CONVERSION

280. Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada repeat and reallege each and every allegation contained in paragraphs 1 through 279 of the Complaint as if fully set forth herein.

281. Upon information and belief, the Defendants, through the Stock Borrow Program, borrowed shares of Nanopierce stock from lending Members in order to cover open fail to deliver positions. The NSCC then delivered these Nanopierce shares to buyers. Upon delivery, the buyer acquired all right, title and interest in the Nanopierce shares, including the right to vote, receive dividends and resell the shares, without encumbrance or any reservation of rights.[15] This transaction was actually a sale of Nanopierce shares and not a loan. As a result, the Defendants exercised a wrongful and unauthorized dominion and control over the aforesaid borrowed Nanopierce shares, since the Defendants do not own the shares and have no right to transfer them.

282. Further, the Defendants have not obtained consent of the beneficial owners of the shares borrowed and transferred through the Stock Borrow Program.

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15. As noted in NASD Proposed Amendments Relating to Short Sale Delivery Requirements (SR-NASD-2004-044), "significant failures to deliver can impact certain rights of buyers, such as the right to vote shares or the treatment of dividends".

283. Upon information and belief, Plaintiff Seitz's, Plaintiff Knight-McConnell's, Plaintiff Stock's, Plaintiff O'Sullivan's and Plaintiff Kolada's shares were borrowed and transferred by the DTCC, the NSCC and the Depository Trust through the Stock Borrow Program without their consent. By borrowing shares without Plaintiff Seitz's, Plaintiff Knight-McConnell's, Plaintiff Stock's, Plaintiff O'Sullivan's and Plaintiff Kolada's consent, the Defendants have exerted a wrongful dominion and control over the borrowed shares which is inconsistent with the rights of Plaintiffs Seitz , Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada and therefore constitutes a conversion of the borrowed shares.

284. The Defendants, through the implementation of the Stock Borrow Program, allowed an unlimited number of shares to be borrowed for an unlimited period of time. Because of this, the Stock Borrow Program actually increased the supply of shares of Nanopierce stock in the marketplace by the number of shares borrowed.

285. As a result, the Defendants have created additional unregistered and unauthorized Nanopierce shares and artificially increased the supply of Nanopierce shares in the marketplace and decreased the value of the stock.

286. The Defendants' conversion of Plaintiff Seitz's, Plaintiff Knight-McConnell's, Plaintiff Stock's, Plaintiff O'Sullivan's and Plaintiff Kolada's shares through borrowing in the Stock Borrow Program decreased the value of Nanopierce stock and thus damaged the value

of Nanopierce shares held by Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada.

287. As a result of the wrong alleged herein, Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada have suffered damages in an amount representing the value of the stock prior to the conversion minus the value of the stock after the conversion.

As and For a Twentieth Claim for Relief for Intentional Interference with Contractual Relations Between Nanopierce and its Shareholders

288. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 287 of the Complaint as if fully set forth herein.

289. The operation of the Stock Borrow Program by the Defendants is an intentional interference with Nanopierce's contractual relationships with its shareholders, including but not limited to Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada.

290. The Articles of Incorporation of Nanopierce constitute a contract between Nanopierce and its shareholders which sets forth the number of shares Nanopierce is authorized to issue.

291. The Defendants are aware of the existence and terms of this contract, since the Articles of Incorporation of Nanopierce are public records on file with the Nevada Secretary of State. Further, Nanopierce is a public company that is required to make public filings to the Securities and Exchange Commission and consequently information regarding Nanopierce is widely available.

292. The operation of the Stock Borrow Program by Defendants is an intentional interference with the contractual relationship between Nanopierce and its shareholders.

293. The operation of the Stock Borrow Program by the Defendants has interfered with and contravened the terms of Nanopierce's Articles of Incorporation because by covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the Buy Side Members, the NSCC has artificially created unauthorized, unregistered, free trading Nanopierce shares. This constitutes a clear contravention of Nanopierce's Articles of Incorporation and contractual relationship with its shareholders, including but not limited to Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada.

294. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program, the NSCC, as borrower, has subjected itself to the possibility of significant financial losses if the sellers are ultimately unable to honor their delivery obligations.

Therefore, the Defendants have motive to continue to operate the Stock Borrow Program in order to manipulate downward the price of Nanopierce's stock and reduce the market value of the open fail to deliver positions created by sellers.

295. The interference with Nanopierce's Articles of Incorporation by Defendants' creation of artificial additional Nanopierce shares through the Stock Borrow Program has damaged Nanopierce and its shareholders. The creation of unauthorized Nanopierce shares has caused an increase in the supply of such Nanopierce shares in the marketplace, which has significantly decreased the value of Nanopierce shares held by its shareholders, including but not limited to Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada.

296. As a result, Nanopierce and its shareholders, including but not limited to Plaintiff Seitz, Plaintiff Knight-McConnell, Plaintiff Stock, Plaintiff O'Sullivan and Plaintiff Kolada have suffered substantial damages in an amount to be proven at trial.

As and For a Twenty-First Claim for Relief for Breach of Implied Covenant of Good Faith and Fair Dealing

297. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 296 of the Complaint as if fully set forth herein.

298. Nanopierce stock certificates constitute a contract between Nanopierce and the shareholder named on the stock certificate.

299. The Depository Trust is a shareholder of Nanopierce.

300. Upon information and belief, as of April 5, 2004, Depository Trust held, in trust, in its nominee name, Cede & Co., 53,503,305 shares of Nanopierce stock.

301. As a trustee and shareholder of Nanopierce shares, the Depository Trust is required to lawfully hold Nanopierce's shares.

302. Nanopierce relied on the Depository Trust, as shareholder and trustee of its shares, to act in good faith when holding its shares.

303. By permitting shares of Nanopierce to be diluted through the operation of the Stock Borrow Program, the Depository Trust has breached the implied covenant of good faith and fair dealing.

304. As a result, Nanopierce has suffered substantial damages in an amount to be proven at trial.

AS AND FOR A TWENTY-SECOND CLAIM FOR RELIEF FOR CONSPIRACY

305. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 304 of the Complaint as if fully set forth herein.

306. The DTCC, the NSCC and the Depository Trust acted in concert to operate the Stock Borrow Program for the purpose of manipulating the price of Nanopierce stock.

307. By permitting shares of Nanopierce to be borrowed through the Stock Borrow Program, the DTCC, the NSCC and the Depository Trust have conspired to drive down the price of Nanopierce stock.

308. Upon information and belief, the price of Nanopierce stock fell because the operation of the Stock Borrow Program by the Defendants allowed the manipulation of Nanopierce stock by various sellers who failed to deliver Nanopierce shares.

309. The Defendants conspired to maintain significant open fail to deliver positions of millions of shares of Nanopierce stock for extended periods of time by implementing the Stock Borrow Program to cover these open and unsettled positions.

310. By covering open fail to deliver positions with shares borrowed through the Stock Borrow Program and delivering the borrowed shares to the buyers, the Defendants artificially created unregistered, free trading Nanopierce shares and increased the supply of Nanopierce shares in the marketplace without authority.

311. The artificially increased supply of Nanopierce shares in the marketplace created by the NSCC's and Depository Trust's borrowing of Nanopierce shares

through the Stock Borrow Program to cover open fail to deliver positions caused a dramatic devaluation of Nanopierce stock that would not have occurred absent the actions of Defendants as described herein.

276. As a result, Plaintiffs have suffered substantial damages in an amount to be proven at trial.

Prayer for Relief

WHEREFORE, Plaintiffs demand judgment in its favor and against the Defendants as follows:

a. Damages in an amount in excess of $10,000 in favor of each Plaintiff and against each Defendant;

b. Treble damages under the Nevada Unfair Trade Practices Act;

c. An accounting of all profits which inured to Defendants as a result of their scheme and disgorgement of those profits to Plaintiffs;

d. Attorneys' fees, expert witness fees, and costs, as allowed by law;

e. Pre-judgment and post-judgment interest at the maximum rate allowed by law;

f. Exemplary, special and punitive damages from all Defendants;

g. Costs incurred; and

h. Such other and further relief the Court deems just and proper.

Dated: May 11, 2004

Respectfully submitted,

By: s/ Dan C. Bowen

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